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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

DARWIN GREEN, ET AL.,

PETITIONERS,

v.

NORTH ARUNDEL HOSPITAL ASSOCIATION, INC., ET AL.,

RESPONDENTS.

On Petition for Writ of Certiorari to the Court of Appeals of Maryland

PETITION FOR WRIT OF CERTIORARI

SUZANNE C. SHAPIRO
Counsel of Record
Saul E. Kerpelman & Associates, P.A.
10 North Calvert Street, Suite 600
Baltimore, Maryland 21202
(410) 547-0202

Counsel for Petitioners

217 pp

QUESTION PRESENTED

Petitioner is severely disabled. He cannot walk or talk. He is able to sit in a wheelchair. He has limited mental capacity. His condition is a result of alleged medical malpractice by respondents. Petitioners filed a lawsuit in state court for alleged malpractice. Prior to the start of trial and before a jury panel was voir dired or selected, the trial judge ruled that petitioner could not exercise his constitutional right to be present at his own trial to determine defendants' liability, even for a short time, because the mere sight of his disability would create emotional sympathy and thereby necessarily prejudice the jury in his favor. In conflict with decisions of other state courts of last resort, and decisions by the U.S. Courts of Appeals, the Court of Appeals of Maryland, in an opinion by Judge Wilner, upheld the trial court's decision, ruling that a severely mentally disabled individual, who cannot comprehend proceedings and assist counsel, may be prohibited from attending his own civil trial solely on the basis of a trial judge's presumption that seeing the disability may result in a jury being prejudiced in his favor. This rule of exclusion does not require voir dire or jury screening to test this presumption of prejudice. Chief Judge Bell and Judge Rodowsky dissented.

The question presented is:

Whether a trial judge's blanket refusal to allow a severely mentally disabled party to be present at the liability phase of his own civil trial, solely on the basis of a presumption of prejudicial jury sympathy upon observation of the plaintiff's disability, violates the Due Process and Equal Protection Clauses of the United States Constitution, as well as the Americans with Disabilities Act, where the trial judge made no finding of courtroom disruption, nor any finding of actual prejudice to the defendants.

RULE 14.1(b) STATEMENT OF ALL PARTIES TO THE PROCEEDING

Petitioners here (also petitioners in the Maryland Court of Appeals, appellants in the Maryland Court of Special Appeals and plaintiffs in the Circuit Court for Anne Arundel County, Maryland below) include Darwin Green, a disabled individual and his parents and next friends, Theresa Johnson and Charles Johnson.

Respondents here (also respondents in the Maryland Court of Appeals, appellees in the Maryland Court of Special Appeals and defendants in the Circuit Court for Anne Arundel County, Maryland below) include Richard T. Fields, M.D., Stewart P. Axelbaum, M.D., Harshad R. Mody, M.D., and North Arundel Hospital Association, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Darwin Green and his parents and next friends Theresa Johnson and Charles Johnson, respectfully petition this Court for a writ of certiorari to review the judgment of the Court of Appeals of Maryland in this case.

OPINIONS BELOW

The opinion of the Court of Appeals of Maryland (App., *infra*, 1a-67a) is reported at 366 Md. 597, 785 A.2d 361. The opinion of the intermediate appellate court, the Maryland Court of Special Appeals (App., *infra*, 68a-101a) is reported at 126 Md. App. 394, 730 A.2d 221.

JURISDICTION

The judgment of the Maryland Court of Appeals was entered on November 27, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part: "No State shall * * * deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The relevant provisions of the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, are reproduced at App., *infra*, 102a-107a. The pertinent regulations implementing the Act, 28 C.F.R. pt. 35, and app. A, are reproduced at App., *infra*, 108a-143a.

STATEMENT

Darwin Green is alive. He is conscious. Just as a month old infant looks into the eyes of its mother with love and recognition, so does Darwin. App., *infra*, 145a, 155a-156a, 162a. In the eyes of the law and the United States Constitution he is a person with inalienable rights. Yet, despite all the protections in the Federal Constitution and the Americans with Disabilities Act, Maryland's highest court, the Court of Appeals, has forfeited Darwin's fundamental right to be present at trial to redress his grievances, and likened him to an inanimate object not endowed with the same rights enjoyed by the rest of us, because he is mentally disabled. App., *infra*, 29a-30a.

This case raises important, recurring questions in state and federal courts, as to whether, and under what circumstances, a trial court can summarily abrogate a civil litigant's federal constitutional and statutory rights to be a part of the judicial process. As described by Chief Judge Bell in his dissenting opinion, many state courts of last resort, as well as the Federal Courts of Appeals for the First Circuit and the Sixth Circuit, have attempted to answer these questions. App., *infra*, 49a-57a. As a result, conflicts abound.

The decisions generally tend to fall into three categories. Some jurisdictions hold that a plaintiff has an absolute right to be present at his or her civil trial and involuntary exclusion is not permitted. Many more jurisdictions hold that the right to be present is not absolute. Of these jurisdictions permitting party exclusion, the circumstances for allowance of the exclusion differ. Some jurisdictions are less tolerant of involuntary exclusion of a party and allow for exclusion only under "extreme" or "unusual" circumstances. These courts do not allow exclusion based on the mere physical appearance of a party and tend to allow for exclusion only to prevent disruption of the proceedings and to preserve decorum or orderly proceedings of the court. Other

jurisdictions are more liberal in allowing for party exclusion and permit the involuntary exclusion of parties who are unable to aid counsel or understand the proceedings and whose physical appearance is determined in the discretion of the trial court likely to be prejudicial to the other party.

As pointed out by Chief Judge Bell (App., *infra*, 62a), and the Oklahoma Supreme Court, this line of cases needs to be reexamined, however, in light of the enactment of the Americans with Disabilities Act ("ADA"), a law that specifically prohibits discrimination on the basis of a physical or mental disability. 42 U.S.C. §§ 12101-12213 (1994 & Supp. 1999).

Maryland's Court of Appeals' decision tends to fit in this last category. However, the Maryland Court has employed the disturbing and shocking reasoning that mentally disabled individuals who cannot comprehend proceedings or aid counsel do not have a constitutionally protected right of presence because the party is incapable of making a conscious decision in this regard. This reasoning reduces mentally disabled parties to evidentiary objects, without the federal constitutional and statutory protections enjoyed by those more fortunate in society. App., *infra*, 30a. In essence, the Maryland Court has stripped mentally incapacitated citizens of their personhood before the law. The court has stripped them of their humanity, their dignity, and the corresponding inalienable rights surrounding personhood and citizenship, which is an affront to all those who respect the principle that all persons are equal before the law.

Given the split among state and federal courts, and given the Maryland Court of Appeals complete disregard for a mentally disabled party's constitutionally and statutorily protected right of presence in court, it is time for this Court to address the question presented. Review in *this* case is *especially* appropriate and necessary. The Maryland Court has established a dangerous precedent for party exclusion of the mentally disabled, without any constitutional standard of

review in place, and is leading us down a slippery slope. Rather than holding steadfast to the notion that we *all* enjoy certain basic rights, the court allows for exclusion of a party based on stereotypical concerns and prejudices about the disabled, without a more constitutionally critical examination of whether those fears are legitimate.

Maryland's highest court also does not seem to be concerned that its holding is inconsistent with the mandates of the ADA and is discriminatory against our most vulnerable citizens. This decision is in contravention of a national goal, as set out in the ADA, to integrate the disabled into the mainstream of American life and not to discriminate on the basis of disability. Contrary to the ADA's plain language and legislative intent (App., *infra*, 102a-143a), this decision institutionalizes stereotypical prejudices against the disabled, segregates and relegates the disabled to a lesser legal status, and undermines the purpose and credibility of our justice system.

The comprehensive expression of opposing views in the majority and dissenting opinions below make this the ideal case in which to resolve the important question presented.

A. The Constitutional and Statutory Scheme

In addition to the Fourteenth Amendment to the United States Constitution, which grants every citizen due process and equal protection rights, the Americans with Disabilities Act, a law that specifically prohibits discrimination on the basis of a physical or mental disability, greatly impacts on the issue before the Court. Specifically, activities by public entities, including practices of public officers of the Maryland State court system, are covered under Title II of the ADA. 42 U. S. C. §§ 12131-12165 (1994 & Supp. 1999). App., *infra*, 105a-106a, 109a, 133a, 137a.

Part A of Title II and the Department of Justice regulations promulgated thereunder state as follows: "Subject to the provisions of this subchapter, no qualified individual with a disability *shall*, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132 (1994) (emphasis added); 28 C.F.R. § 35.130(a) (2002). App., *infra*, 106a, 139a.

B. Stage in Proceedings when Federal Questions Timely and Properly Preserved for Appeal

By Motions in Limine filed in the trial court approximately two weeks prior to the commencement of jury trial proceedings, and without any demonstrated cause for concern, respondents sought to involuntarily exclude Darwin from attending any part of his own civil trial. In response to these motions, petitioners filed a timely response. App., *infra*, 144a-153a. In their written response, petitioners raised federal constitutional and statutory concerns that involuntary exclusion of a disabled party did not comport with the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution (App., *infra*, 146a-148a), and was not in compliance with the mandates of the ADA. App., *infra*, 150a-151a. Petitioners described the action as "frank, blatant discrimination against a disabled person." App., *infra*, 144a. The trial court held a hearing on the motions the day prior to commencement of trial. App., *infra*, 155a-171a. During oral argument on the motion, petitioners raised the same federal issues raised in their written response. At the conclusion of the hearing and after viewing a video representing a "day-in-the-life" of the plaintiff, the trial court ruled to exclude the plaintiff from attendance at any part of the trial. App., *infra*, 172a-175a.

At the conclusion of the trial, petitioners noted a timely appeal to Maryland's intermediate appellate court, the Maryland Court of Special Appeals. *Inter alia*, petitioners raised federal constitutional and statutory concerns that barring the plaintiff from his own trial as a result of his physical and mental disability violated the ADA, as well as fundamental notions of due process and equal access to justice implicit in the United States Constitution. App., *infra*, 72a, 88a-97a. In a reported opinion, the intermediate appellate court affirmed the trial court's decision to exclude the plaintiff from attendance at trial. App., *infra*, 97a. Petitioners appealed to the Maryland Court of Appeals, raising the issue of whether party exclusion violated the United States Constitution and the ADA. App., *infra*, 32a. A divided appellate court, in a reported opinion, affirmed the intermediate appellate court's judgment. App., *infra*, 1a-30a. Chief Judge Bell and Judge Rodowsky dissented and filed a reported dissent. App., *infra*, 31a-67a.

C. Facts of the Litigation

Darwin was born with a medical condition known as hydrocephalus, in which excessive accumulation of fluid causes increased pressure on the brain. To correct this condition, doctors inserted a shunt in his brain nine days after birth, and a second shunt at age four. Darwin responded well to the placement of the shunts and functioned reasonably well. Although his intellectual capability was somewhat limited, he was able to attend school, take special education classes, go on family vacations, and otherwise enjoy a happy childhood. App., *infra*, 3a, 33a.

The events leading to this lawsuit began when Darwin was eleven years old. Darwin's shunt began to malfunction. His parents took him to the Emergency Department of respondent, North Arundel Hospital. Although Darwin arrived at the hospital complaining of symptoms that

indicated severe shunt blockage that could ultimately lead to death, physicians at the hospital diagnosed him with a vascular headache, gave him a prescription painkiller, and sent him home. App., *infra*, 3a-4a, 33a- 34a.

The following day Darwin's symptoms persisted, and his parents took him to the University of Maryland Hospital, where his condition was correctly diagnosed. Before Darwin could obtain proper surgical treatment for his life threatening condition, he suffered cardiac arrest, which left him severely brain damaged. Presently, Darwin is wheelchair bound, has limited movement, and cannot speak. His mental capacity is severely limited. No one knows his level of comprehension. App., *infra*, 4a, 34a.

This lawsuit began when Darwin's parents filed a medical malpractice action individually and on Darwin's behalf against respondents, North Arundel Hospital Association and Drs. Richard T. Fields, Stewart P. Axelbaum, and Hashard R. Mody. Darwin's family believes that his current physical and mental disability directly resulted from medical malpractice by these health care professionals. They claim in their lawsuit that respondents breached the applicable standard of care by failing to properly diagnose the malfunction of the shunt in Darwin's brain, and that a proper diagnosis would have prevented his subsequent cardiac arrest. App., *infra*, 2a, 34a.

D. Trial Court's Ruling to Involuntarily Exclude the Plaintiff From Attendance at Trial

On October 30, 1996, after defendants filed a motion requesting bifurcation, the trial judge assigned to the trial of the case decided to bifurcate the issue of liability and damages. A trial solely as to liability was scheduled for October 7, 1997. App., *infra*, 2a.

Just prior to trial, on September 18, 1997, defendant North Arundel Hospital filed a motion styled "Motion in

Limine to Exclude the Presence of Darwin Green From the Courtroom at Trial."[1] App., *infra*, 14a. Plaintiffs filed a written response to this motion on September 30, 1997. App., *infra*, 144a-154a. In their response, plaintiffs objected to the involuntary exclusion of Darwin. They argued that no valid reason existed to involuntarily exclude Darwin from attending his own trial because he would not be disruptive or interfere with the orderly proceedings of the court. App., *infra*, 145a. Plaintiffs objected to the involuntary exclusion on the ground that it violated Darwin's fundamental rights pursuant to the Fourteenth Amendment to the United States Constitution, as well as his statutory rights pursuant to the ADA. Plaintiffs alleged that involuntary exclusion of a party, based merely on a party's appearance, offended due process, and was frank, blatant discrimination against a disabled individual.

On October 6, 1997, one day before trial, the trial court held a hearing on the motion. App., *infra*, 155a-171a. Defendants argued that because Darwin's mere appearance before the jury at trial would prejudice them, his exclusion was permissible within the trial court's discretion and did not contravene the ADA or the federal and state constitutions. Plaintiffs asserted that exclusion was unconstitutional because defendants had not met their burden of showing that actual prejudice would result.

After viewing a "day-in-the-life" video of Darwin, the trial court ruled to exclude Darwin from attending any part of his trial. App., *infra*, 172a-175a. The trial court did not exclude Darwin to preserve decorum or to continue the orderly proceedings of the court. The trial court did not exclude Darwin because he was likely to engage in disorderly conduct. Instead, the trial court excluded Darwin solely because of his appearance and because of his inability

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[1] Defendants, Stewart P. Axelbaum, M.D., Richard T. Fields, M.D., and Harshad Mody, M.D. filed similar motions on September 22, 1997 and September 25, 1997.

to understand the proceedings or assist counsel.[2] During the hearing the trial court stated as follows:

> The burden of persuasion is to the moving party, and they have carried that burden in this instance. The Defendant who seeks to exclude a handicapped plaintiff must establish that the presence of the plaintiff would prevent and substantially impair the jury's performance. The impairment or the prejudice must be so great that the jury instructions would not likely correct the prejudice. And having viewed the tape, the Court is convinced that any viewing of the Plaintiff in person or by video would leave any party in a position to be emotionally struck and otherwise feeling sympathy for the Plaintiff. (App., *infra*, 65a, 175a).

The case proceeded to trial on the merits without Darwin present and was ultimately presented to the jury to determine liability. The trial court granted defendants' North Arundel Hospital's and Dr. Mody's motions for judgment and the jury returned a verdict in favor of the remaining defendants.

E. The Decision of the Maryland Intermediate Appellate Court

Plaintiffs filed a timely appeal to Maryland's intermediate appellate court, the Court of Special Appeals.

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[2] The trial court determined that Darwin did not have the ability to communicate with his attorneys, nurses, or parents; that he would be unable to provide assistance to his attorneys in preparing the case; and that he would not understand or comprehend any portion of the trial proceedings or the pleadings. Petitioners argued during the hearing that it is not known whether Darwin could understand the process. The trial court rejected this argument noting that any such ability to understand "is not conveyed in any fashion to his parents or to the attorneys that will be representing him." App., *infra*, 16a, 37a, 173a-174a.

On appeal plaintiffs asserted that involuntary party exclusion offended the party's U.S. constitutional rights pursuant to the Fourteenth Amendment, as well as the ADA. The Court of Special Appeals, in a reported opinion, affirmed the trial court's ruling to exclude the plaintiff. *Green v. North Arundel Hospital*, 126 Md. App. 394, 730 A.2d 221 (1999). App., *infra*, 68a-101a. It applied the analysis employed by the United States Court of Appeals for the Sixth Circuit in *Helminski v. Ayerst Labs.*, 766 F.2d 208 (6th Cir. 1985). (This case permits the involuntary exclusion of parties who are unable to aid counsel or understand the proceedings and whose physical appearance is determined in the discretion of the trial court to be prejudicial to the other party.)

F. The Decision of the Maryland Court of Appeals

Plaintiffs filed a Petition for Writ of Certiorari to Maryland's court of last resort, the Court of Appeals. Once again plaintiffs alleged that Darwin's federal constitutional and statutory rights had been violated by his involuntary exclusion from his own trial. The Court of Appeals granted certiorari. A divided court affirmed the trial court's decision to involuntarily exclude the plaintiff from appearing at trial. *Green*, 366 Md. 597, 785 A.2d 361 (2001). The majority agreed that the appropriate analysis is that of the *Helminski* court. Upon making its ruling, the Court of Appeals stated:

> In the liability phase of a bifurcated trial, the court has discretion to exclude a plaintiff where, after a hearing and an opportunity to observe the plaintiff, either in person or by other reliable means, the court determines, on the record, that: (1) the plaintiff is severely injured; (2) the plaintiff attributes those injuries to the conduct of the defendant(s); (3) there is a substantial prospect that the plaintiff's presence in the courtroom may cause the jury to side with the

> plaintiff out of emotional sympathy rather than on the evidence; (4) the plaintiff is unable to communicate or participate in the trial in any meaningful way; *and* (5) the plaintiff would be unable even to comprehend the proceeding. When all of those circumstances exist, as they did here, the plaintiff's presence is not truly an exercise of his/her right of presence, for the plaintiff is incapable of making a conscious decision in that regard. His presence is rather as an exhibit-a piece of evidence-that is both irrelevant and prejudicial, and thus invokes a balancing process enunciated in Maryland Rule 5-403. There was no abuse of discretion here. (App., *infra*, 29a-30a).

The Maryland Court of Appeals has refused to adopt a constitutional standard of review to ensure that every individual's fundamental rights derived from the United States Constitution and federal statutes are preserved. Maryland's highest court has held that an individual with a certain degree of mental disability has no constitutional rights to be present. The court reasoned that a mentally limited individual was no longer a person with inalienable rights, that a mentally limited individual is nothing more than an exhibit to be presented to the jury, and that a mentally limited individual should be treated as having no more rights than a piece of evidence when a court makes a determination of whether the mentally and physically disabled person can enter the courtroom. Only those who can consciously make a decision with regard to the exercise of the right to be present have such a constitutional right. Therefore, a court need not consider the constitutional implications of involuntarily removing a party who cannot comprehend the proceedings or aid counsel.

Chief Judge Bell and Judge Rowdowsky disagree with this holding. In a lengthy dissent, Chief Judge Bell wrote that he is "not persuaded by *Helminski* and those cases permitting

the exclusion of parties who are unable to aid counsel or understand the proceedings and whose physical appearance is determined to be prejudicial to the other party." App., *infra*, 61a. Instead, the dissent agrees with the approach adopted by the Oklahoma Supreme Court in *Cary ex rel Cary v. Oneok, Inc.*, 940 P.2d 201 (Okla. 1997) (App., *infra*, 61a), in which the Oklahoma Court rejected the proposition that a party could be excluded solely on the basis of appearance and permitted involuntary exclusion of a party "only in the case of extreme circumstances." App., *infra*, 51a. Chief Judge Bell explained that the extreme circumstance exception is to preserve courtroom decorum and not disrupt the orderly proceedings of the court. Judge Bell wrote: "I would hold that, absent a voluntary waiver, a party may not be excluded from his or her trial except 'to preserve decorum or to continue the orderly proceedings of the court.'" App., *infra*, 61a. Chief Judge Bell protests: "The court was overly sensitive that the jury would be sympathetic to the petitioner and, more to the point, without any basis for so concluding except the viewing of the video, concluded that the jury would be unduly swayed by that sympathy to the prejudice of the respondents." App., *infra*, 65a. The dissent asserts that "'a stereotypical assumption that a party's disability will prejudice the jury' * * * is an insufficient ground for exclu[sion]." App., *infra*, 63a. Concerned for a litigant's federal constitutional and statutory protections, Chief Judge Bell wrote that the majority holding does not respond "to an overriding, necessary, and compelling objective consistent with the Court's mandate and purpose," (App., *infra*, 67a), and lacks a rational and principled basis for not trusting the jury. App., *infra*, 62a, 63a.

- REASONS FOR GRANTING THE PETITION

This Court should grant review because state courts of last resort, as well as the United States Courts of Appeals for

the First Circuit and Sixth Circuit are in disagreement over the recurring issue as to whether, and under what circumstances, a trial judge may exclude a disabled party plaintiff from attendance at the liability phase of his own civil trial.

In addition, the Maryland Court of Appeals' ruling is erroneous as a matter of United States constitutional law and seriously infringes on disabled individuals' statutory rights pursuant to the ADA. The Maryland Court refused to apply a constitutional standard of review to its rule of exclusion when eliminating a litigant's constitutionally implicit right to be present to redress a grievance. Instead, the Maryland Court adopted a standard that allows a trial court to exclude a plaintiff with a mental disability if in the court's discretionary opinion the plaintiff's mere appearance will create a substantial prospect of jury prejudice, with no requirement of voir dire or jury screening to test this presumption of prejudice. In other words, a mentally disabled plaintiff's right of presence can be forfeited with no showing of real, specific and articulable juror bias that would lead to a prejudicial proceeding.

The issue presented in this case is common and recurring. It would, therefore, be best handled with a settled rule of law that follows a federal constitutional standard and treats all litigants uniformly. Democracy requires that every litigant in every jurisdiction be given the same constitutional protections. This Court should grant certiorari to restore sensible and certain rules to our most basic judicial process, to ensure that every litigant's most basic and fundamental right to a fair and meaningful court proceeding, which incorporates the right to participate, is constitutionally protected, including the rights of litigants who are severely limited mentally, to restore the public's perception of fairness of court proceedings, to ensure that discrimination has no place in our court system, to ensure that every litigant has equal access to our justice system, and as Chief Judge

Bell predicts, to avoid the absurd result that two individuals with identical physical disabilities, but differing mental capacities "will be treated differently" by our court system ("one excluded and the other allowed to remain in the courtroom"), with no principled or rational basis for doing so. App., *infra*, 61a, 62a-63a. This standard institutionalizes lack of trust in the jury system for only one group of severely mentally disabled individuals, when the unfounded fear could apply to any party who elicits sympathy.

This case has significant impact not just on petitioner, but a much larger segment of the population. This case is a blow to basic human rights of our most vulnerable citizens, and mars the integrity of our judicial system. It summarily, without any constitutional safeguard in place, eliminates fundamental rights of severely mentally disabled litigants, and likens them to inanimate objects, denying their personhood. It broadcasts a clear message from the State that disabled citizens do not have the same rights as the rest of us. It creates a lower legal status for the disabled. It reinforces unnecessary and unwarranted stereotypes and prejudices against the disabled. App., *infra*, 66a.

The decision betrays our judicial system's most fundamental guarantee: fairness and justice for all. It discourages our most necessary and fundamental precept of justice: trust in the jury system. Rather than place trust in our system, it incorporates discrimination into our very process of justice, where the law itself unfolds. If our citizens cannot expect constitutional law to be invoked in the courtroom itself, where the government invokes its laws, then our ideal of a democratic government is undermined.

I. THE DECISION OF THE MARYLAND COURT OF APPEALS CREATES MULTIPLE CONFLICTS WITH OTHER STATE COURTS OF LAST RESORT AND FEDERAL COURTS OF APPEALS

A patch-work of decisions has evolved among state courts of last resort, as well as the United States Courts of Appeals for the First Circuit and Sixth Circuit, which are in disarray as to the important issue of whether a disabled party has a constitutionally protected right to be present at his or her own civil trial, and under what circumstances, if any, that right may be abrogated. [3]

Several states have ruled that a plaintiff has an absolute right to be present at his or her civil trial. These states, which represent the minority position, include Connecticut, Illinois, Michigan, New Jersey, New York and North Carolina.[4] *See, e.g., Rozbicki v. Huybrechts,* 218 Conn. 386, 589 A.2d 363, 365 (1991) (recognizing that "a party's constitutional right to a civil jury trial encompasses the right to be present in the court during all phases of the trial, including proceedings prior to the trial on the merits of the case."); *Odum v. Corn Products Refining Co.,* 173 Ill. App. 348, 352 (1912) ("We know of no law that prevents interested persons from being present at the hearing of their case, even though their unfortunate condition was such as to enlist the sympathy of the jury."); *Ziegler v. Funkhouser,* 42 Ind. App. 428, 85 N.E. 984, 986 (1908) (every litigant has a right to be present in

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[3] See Chief Judge Bell's dissenting opinion, which outlines these conflicts. App., *infra*, 49a-56a. *See also* Francis M. Dougherty, Annotation, *Physical Condition of Plaintiff in Personal Injury Action as Affecting Right to be Present at Trial*, 27 A.L.R.4th 583 (1984); Allen P. Grunes, *Exclusion of Plaintiffs from the Courtroom in Personal Injury Actions: A Matter of Discretion or Constitutional Right?* 38 CASE W. RES. L. REV. 387 (1987-88). *Compare* Matthew A. Sokol, Cary v. Oneok, Inc.: *Oklahoma Supreme Court Upholds Plaintiff's Right to Attend Trial*, 19 PACE L. REV. 195 (1998) *with* Kristy Freeman, *Civil Procedure: Exclusion of Injured or Disfigured Plaintiffs From Trial--* Cary V. Oneok, Inc.*--A Solution to the Exclusion Issue or Bad Precedent?*, 52 OKLA. L. REV. 109 (1999).

[4] Although the Supreme Court of Indiana has not spoken on this issue, the Indiana intermediate appellate court has ruled on both sides of this issue. *Compare Ziegler v. Funkhouser*, 42 Ind. App. 428, 85 N.E. 984 (1908) *with Gage v. Bozarth*, 505 N.E.2d 64 (Ind.App.1987).

person and be heard by counsel on the trial of his case); *McIntosh v. McIntosh,* 79 Mich. 198, 203, 44 N.W. 592 (1890) (acknowledging that the exclusion of witnesses generally is within the discretion of the court, but pointing out that "[t]here is no rule * * * by which the court is authorized to exclude[ ] a party to the controversy.");[5] *Leonard's of Plainfield, Inc. v. Dybas,* 130 N.J.L. 135, 31 A.2d 496, 497 (1943) (determining that the "right of the parties to the cause to be present in person and by counsel at all stages of the trial, except the deliberations of the jury, is basic to due process."); *Carlisle v. County of Nassau,* 64 A.D.2d 15, 408 N.Y.S.2d 114, 116 (1978) ("the fundamental constitutional right of a person to have a jury trial in certain civil cases includes therein the ancillary right to be present at all stages of such a trial, except deliberations of the jury"); *Raper v. Berrier,* 246 N.C. 193, 97 S.E.2d 782, 784 (1957) (parties are entitled to be present at all stages of a civil trial).

The majority of courts that have considered the issue of whether the right of a civil party litigant to attend his or her trial is absolute have decided that the right is not absolute. *See Rubert-Torres v. Hospital San Pablo, Inc.,* 205 F.3d 472, 478 (1st Cir. 2000);[6] *Helminski v. Ayerst Laboratories,* 766 F.2d 208, 217 (6th Cir. 1985); *Levi v. District of Columbia,* 697 A.2d 1201, 1205 (D.C. App. 1997); *Ryfeul v. Ryfeul,* 650

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[5] More recently, the Michigan Court of Appeals, in *Florence v. Wm. Moors Concrete Products, Inc.,* 35 Mich. App. 613, 193 N.W.2d 72 (1971), agreeing with the plaintiffs' contention that they had "an absolute right to be present at all stages of the proceedings regardless of whether criminal or civil in nature," ruled that it was reversible error to require the plaintiffs in a wrongful death suit to leave the courtroom while the judge reread the charge to the jury.

[6] *See also Gonzalez-Marin v. Equitable Life Assurance Soc'y,* 845 F.2d 1140, 1146 (1st Cir. 1988). In Both *Gonzalez-Marin* and *Rubert-Torres* the United States Court of Appeals for the First Circuit held that a trial court may theoretically exclude a disabled plaintiff who cannot comprehend the proceedings, but declined to exclude in those cases because the burden of proof on the issue was not met.

P.2d 369, 374 (Alaska 1982); *Florida Greyhound Lines, Inc. v. Jones,* 60 So.2d 396 (Fla. 1952); *Morley v. Superior Court,* 131 Ariz. 85, 638 P.2d 1331, 1334 n. 1 (1981); *Whitfield v. Roth,* 10 Cal.3d 874, 112 Cal. Rptr. 540, 519 P.2d 588 (1974); *Purvis v. Inter-County Telephone & Telegraph Co.,* 203 So.2d 508, 511 (Fla. Dist. Ct. App. 1967); *Gage v. Bozarth,* 505 N.E.2d 64 (Ind. App. 1987); *Dickson v. Bober,* 269 Minn. 334, 130 N.W.2d 526, 530 (1964) ("determination of whether a plaintiff unable by reason of his injuries to contribute to or understand the trial proceedings should be permitted * * * to attend the trial must rest in the sound discretion of the trial court * * * "); *Mason v. Moore,* 226 A.D.2d 993, 641 N.Y.S.2d 195 (1996); *Caputo v. Joseph J. Sarcona Trucking Co.,* 204 A.D.2d 507, 611 N.Y.S.2d 655 (1994); *Matter of Radjpaul v. Patton,* 145 A.D.2d 494, 535 N.Y.S.2d 743 (1988); *Reems v. St. Joseph's Hospital and Health Center,* 536 N.W.2d 666 (N.D. 1995); *Cary ex rel Cary v. Oneok, Inc.,* 940 P.2d 201 (Okla. 1997); *Bremner By and Through Bremner v. Charles,* 312 Or. 274, 821 P.2d 1080 (1991).[7]

Among the jurisdictions that hold that the right of a party to be present at courtroom proceedings is not absolute, courts disagree as to the circumstances under which exclusion will be upheld. Although these courts tend to disfavor involuntary exclusion of a party from that party's trial, most courts do not describe specific circumstances permitting exclusion, but rather state a general rule that absent a voluntary waiver, only in the case of "extreme," *Cary ex rel Cary, supra,* 940 P.2d at 204, or "unusual," *Mason, supra,* 641 N.Y.S.2d at

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[7] See also *Marks v. Mobil Oil Corp.*, 562 F. Supp. 759, 768 (E.D. Pa. 1983), *aff'd,* 727 F.2d 1100 (3d Cir. 1984) ("A party to a lawsuit has a right to attend the trial absent an overwhelming reason to the contrary. In a civil case, this Court can at this time envision no reason to exclude a party because of his injuries, particularly where, as in this case, the party's behavior at trial was not disruptive."); *In re Richardson-Merrell, Inc. Bendectin Products,* 624 F. Supp. 1212, 1224 (S.D. Ohio 1985), *aff'd,* 857 F.2d 290 (6th Cir. 1988).

197, or "limited circumstances," *Helminski, supra*, 766 F.2d at 217, may a party be excluded from the proceedings.

These courts do not specifically set out the constitutional limits of the trial court's authority to remove a party. *See Cary ex rel Cary, supra*, 940 P.2d at 204. *See also Ryfeul, supra*, 650 P.2d at 372; *Florida Greyhound Lines, Inc., supra*, 60 So.2d at 397; *Purvis, supra*, 203 So.2d at 510-11; *Mason, supra*, 641 N.Y.S.2d at 197 (stating "absent an express waiver or unusual circumstances, a party to a civil action is entitled to be present during all stages of the trial"); *Matter of Radjpaul, supra*, 535 N.Y.S.2d at 745 (same).

Those courts that are least tolerant of involuntarily excluding a party couch the exclusion test in terms of "extreme" or "unusual" circumstances. In one such case, the Oklahoma Supreme Court found error when a badly burned six year old boy was excluded from the courtroom by the trial court, "because he [wa]s scarred so badly [the trial judge] th[ought] it would be unfairly prejudicial." *Cary*, 940 P.2d at 202. The court ruled that a party's disfigurement, alone, may never provide a basis for excluding a party from the courtroom; only exceptional circumstances, such as disruptive behavior, may warrant exclusion. *Id.* at 204. The court opined:

> Oklahoma has never held, nor do we so hold here, that a party's right to be present in the courtroom is absolute. We can contemplate situations in which the disruptive behavior of a party would necessitate the party's exclusion from the courtroom, and a trial may proceed after a party has voluntarily waived the right to be present. However, we find no authority for the proposition that a party may be excluded solely by reason of his disfigurement. Absent a voluntary waiver we hold that only in the case of extreme circumstances may a party be excluded from the proceedings * * * A party's physical appearance

> cannot be the sole basis for exclusion from the courtroom, and does not amount to an 'extreme circumstance' permitting exclusion. We agree with the Florida Supreme Court which stated:
> 'One who institutes an action is entitled to be present when it is tried. That, we think, is a right that should not be tempered by the physical condition of the litigant. It would be strange, indeed, to promulgate a rule that a plaintiff's right to appear at his own trial would depend on his personal attractiveness, or that he could be excluded from the court room if he happened to be unsightly from injuries which he was trying to prove the defendant negligently caused.' *Cary,* 940 P.2d at 204 (quoting *Florida Greyhound Lines, supra,* 60 So.2d at 396) (internal citations omitted).

Courts that are most liberal in permitting involuntary exclusion of a party justify exclusion "under limited circumstances." *Helminski, supra,* 766 F.2d at 217. The circumstance permitting exclusion is where the mere presence of that party would prejudice the other party with regard to liability. However, these cases turn on whether the party is unable to understand, participate in, or contribute to the proceedings, because in that circumstance the party's presence would not aid the fair administration of justice. *See, e.g., Helminski,* 766 F.2d at 217. These courts hold that "absent disruptive behavior, involuntary exclusion of a party who is able to comprehend the proceedings and aid counsel would constitute a denial of due process since exclusion of such a party would deny him the right to obtain a fair trial." *Id. See also Rubert-Torres, supra,* 205 F.3d at 478; *Reems, supra,* 536 N.W.2d at 669; *Caputo, supra,* 611 N.Y.S.2d at 656; *Bremner, supra,* 821 P.2d at 1085; *In re Richardson-Merrell, Inc., supra,* 624 F. Supp. at 1224; *Dickson, supra,* 130 N.W.2d at 530; *Gage, supra,* 505 N.E.2d at 67.

Helminski involved a plaintiff, who was autistic with an extremely low IQ, unable to speak, not toilet trained, and required constant care. The district court allowed exclusion of the plaintiff from the liability phase of the trial, because his appearance before the jury would be prejudicial to defendants' case. *See* 766 F.2d at 212. The United States Court of Appeals for the Sixth Circuit affirmed. Finding "harmless error," the court still addressed the merits of the case. A two-step analysis was established to determine whether a party's involuntary exclusion from the liability phase of trial violates due process:

> In short, the defendant who seeks to exclude a handicapped plaintiff must establish at a hearing that the plaintiff's presence would prevent or substantially impair the jury's performance of its fact-finding task. The requisite showing of prejudice cannot be satisfied simply by establishing that a plaintiff has a physical or mental injury; the party seeking exclusion must establish that the party's appearance or conduct is likely to prevent the jury from performing its duty. We reiterate that a party's ability to comprehend the proceedings or assist counsel is not the relevant inquiry at this juncture--the issue is whether the party's presence will unfairly prejudice the proceedings in his favor. Should the district court determine that the party's mere presence would be prejudicial, the court must next consider whether the party can understand the proceedings and aid counsel. If the trial court concludes that the party can comprehend the proceedings and assist counsel in any meaningful way, the party cannot be involuntarily excluded regardless of prejudicial impact; in such a case, cautionary instructions will protect the interests of the defendant in a fair trial. Exclusion of a party who is able to comprehend the

> proceedings and aid his attorney would infringe upon the 'fundamental standards of fairness which every litigant before a federal court has a right to expect,' *Drayton v. Jiffee Chemical Corp.*, 591 F.2d 352, 361 (6th Cir. 1978), and hence, would constitute a deprivation of due process which could be remedied only by granting a new trial. *Id.* at 218.

The court was concerned about "the jury's ability to decide the case based upon the evidence presented rather than on emotional factors." *Id.* at 217. The court observed that "[t]he benchmark of our judiciary rests on the ability of the court to provide all parties with a fair trial" and that "the court must safeguard the jury's ability to decide the case based upon the evidence presented." *Id.* The court acknowledged, however, as Chief Judge Bell discerns:

> there is a difference between juror sympathy that presents the potential for juror prejudice and juror sympathy that actually results in juror prejudice, 'juror sympathy alone [being] insufficient to establish juror prejudice.' *Id.* [In other words, the likelihood of jury sympathy is not the equivalent of prejudice.] The court also noted that, '[g]enerally, the jury will follow the court's instructions and fulfill its promise to decide the case solely on the facts.' *Id.* Thus, only when the mere presence of a party would render the jury unable to arrive at an unbiased judgment concerning liability, the court made clear, would the rule it enunciated be invoked. *Id.* (App., *infra*, 54a).

Helminski asserts that the physical appearance or condition of a party may not alone justify exclusion. To justify the involuntary exclusion of a party, there must be *shown* prejudice to the opposing party to the extent that the opposing party will not be able to obtain a fair trial. Further,

the party seeking exclusion bears the burden of showing that only through exclusion can a fair trial be obtained. *Helminski*, 766 F.2d at 217. Nonetheless, as Chief Judge Bell recognizes, despite the court's "protestations to the contrary," this case "sanctions the exclusion of a party on the basis of [a] party's physical appearance * * * where the party does not understand the proceedings and cannot assist counsel."[8] App., *infra*, 62a.

In the case presently before the Court, the majority asserts that it adopts the analysis of the *Helminski* court. App., *infra*, 29a. Nonetheless, the analysis of the Maryland Court is the most lenient, thus far, in allowing involuntary exclusion of a party. The court holds that severely mentally disabled litigants are not entitled to the implicit due process right of presence because the plaintiff is incapable of making a conscious decision to exercise that right. Instead, the court describes the severely mentally disabled party as "an exhibit --a piece of evidence--that is both irrelevant and prejudicial." App., *infra*, 30a.

II. THE DECISION OF THE MARYLAND COURT OF APPEALS IS BEYOND CONSTITUTIONAL BOUNDS

Maryland's decision infringes on severely mentally disabled individuals due process and equal protection rights. Any party to a civil action has a federal constitutional right to be present at trial. Implicit within the notion of due process is the right to participate. Decades ago, this Court observed that "[w]e entertain no doubt that the orderly conduct of a trial by jury, essential to the proper protection of the right to be heard, entitles the parties who attend for the

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[8] Since the time the Court of Appeals for the Sixth Circuit rendered a decision in 1985, Congress enacted the ADA, which further impacts on a state court's ability to exclude a party from the courtroom based on physical or mental disability. *See* 42 U.S.C. § 12132 (1994).

purpose to be present in person or by counsel at all proceedings from the time the jury is impaneled until it is discharged after rendering the verdict." *Fillippon v. Albion Vein Slate Co.*, 250 U.S. 76, 81 (1919). The presence of a party serves many legitimate purposes; the very reason most of us assume it is a basic right for a party to be present. A litigant's presence serves the functions of assistance to counsel, truthful fact-finding, presentation of direct evidence, assurance of fairness of proceedings, and to assure the public's perception of fairness of the proceedings. Exclusion, on the other hand, causes harm to the party, society and our court system. App., *infra*, 66a.

Why should one's ability to comprehend have anything to do with removal of one's basic right of presence? The Maryland Court implies that the only constitutionally justifiable reason for a party's presence is to mentally aid counsel or intellectually enjoy the proceeding. The court operates under the assumption that a party's presence in court serves no functional or legitimate purpose, and has no meaning, unless a party can comprehend and actively participate in the proceedings. App., *infra*, 15a. However, that is not the sole determinant of the meaning of the right. A party's personal presence at a trial, regardless of the person's mental state, enhances the ability of the trial process to ascertain the truth. In addition, the party's presence enhances the fairness of the trial and the appearance of fairness essential to public confidence in the system. Finally, a party's presence humanizes the party and does not turn the jury trial into an abstract exercise. All of these legitimate interests inform a party's due process right to be present, despite mental limitations. Abrogating this right profoundly affects the outcome of the trial.

It is more difficult for a witness to lie or distort the truth when looking at the affected individual face to face. It may be much easier for a witness to distort the truth when the adversarial process is whitewashed and the victim is barred

from the courtroom. A witness "may feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting or mistaking the facts. He can now understand what sort of human being that man is." Z. CHAFFEE, JR., THE BLESSINGS OF LIBERTY 35 (1956), quoted in *Coy v. Iowa*, 487 U.S. 1012, 1019 (1988).

Second, a jury may respond differently when faced with the person who suffered the harm, realizing that the trial is not an abstract exercise, but rather involves a living human being. *See* COOLEY, CONSTITUTIONAL LIMITATIONS 312 (8'th ed. 1927) ("[T]he presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and the importance of their functions.") Hence, Darwin's presence would have added to the basic fairness of the trial by humanizing Darwin. His exclusion sterilized the proceedings.

Further, the harm from exclusion extends beyond that inflicted on the plaintiff. The harm touches the entire community. Procedures that purposely exclude disabled persons from trials undermine public confidence in the fairness of our system of justice. A party's personal presence assures that both the participants and society will *perceive* the proceeding as fair. This perception of fairness is critical to continued public confidence in the courts. Conducting a trial *in absentia* is abhorrent to all modern-day notions of justice and trivializes a proceeding that will profoundly influence the rest of the litigant's life. If trials are to be perceived as fair, then the affected parties must be allowed to attend them.

Consequently, a strict constitutional standard is the only proper framework to determine under what circumstances, if any, a party may be excluded. Only under this exacting standard can courts ensure that they are not unnecessarily infringing upon a party's constitutional right to be present at every stage of the trial, and ensure that they are not implementing discriminatory court procedures. A court's

interest in a fair trial for all parties can be satisfied by less restrictive means than exclusion of a mentally disabled party.

The courts below did not employ any constitutional standard when concluding that defendants would not be able to obtain a fair trial, unless the party was removed. Instead, the appellate court sanctioned an *evidentiary* standard of judicial discretion, weighing probative value versus prejudicial effect. The courts below failed to engage in a strict scrutiny, intermediate, or rational basis analysis due any group of *persons* whose basic rights are in question and who is treated unequally by the government. Neither the trial court, nor the Maryland Court of Special Appeals, nor the Maryland Court of Appeals has articulated even a rational basis for the trial judge's discretionary determination that the plaintiff's presence would evoke more than the expected feeling of sympathy and necessarily prejudice the jury.

Utilizing the reasoning of the Maryland Court of Appeals' decision, a trial court has more discretion to exclude a mentally disabled party from attending the party's own trial, than the trial court has to exclude a member of the public who has no interest in the outcome of the proceeding. The public has a basic right to be present for court proceedings implied in the First Amendment of the United States Constitution. This Court has held that the public can only be excluded from the courtroom for a necessary and compelling governmental interest. The court *must* undertake specific fact-finding to determine whether closure is absolutely necessary, and the presiding judge *must* first consider alternatives to closing the proceeding. *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 9-10, 14 (1986).

Although Maryland courts must follow this strict constitutional standard when excluding a member of the public from the courtroom, the Maryland Court of Appeals has decided that it may exclude from the courtroom a mentally disabled party who is unable to comprehend

proceedings based on only a supposition that the litigant's mere presence would so inflame the jury and fill them with such sympathy for the disabled litigant that they would be prejudiced against the defendants allegedly responsible for the litigant's condition. The court need only view the disabled party, in person or by video, to make this presumption. The court is not required to voir dire potential jurors "on the effect that [the disabled party's] presence in the courtroom would have or whether they could, despite any sympathetic feelings, decide the case solely on the facts and the law, as instructed." App., *infra*, 65a.

The trial court is allowed to merely presume, stereotypically, that in its personal opinion everyone would have sympathy for the disabled party, which is synonymous with prejudice, without engaging in a more specific determination, utilizing the jury screening process, of whether this sympathy would lead to a prejudicial jury, not able to perform its duty in accordance with the law. However, as Maryland's Chief Judge Bell points out:

> there is a difference between juror sympathy and juror prejudice. Stated differently, the likelihood of jury sympathy is not the equivalent of prejudice. 'A juror's sympathetic feeling toward a party does not necessarily lead to the conclusion that the jury will disregard the law to reach a verdict based on sympathy alone.' *Cary*, 940 P.2d at 205. (App., *infra*, 63a-64a).

The trial court is not required to examine alternative, less restrictive means to achieve the goal of a fair trial, before involuntarily excluding the mentally disabled party. Although the trial judge retains several powerful tools for detecting and eliminating juror prejudice--voir dire, challenges for cause, and cautionary instructions--the trial judge is not required to implement these less drastic, and

time proven methods for empanelling an unbiased jury, before the extreme step of outright exclusion is considered.

Fundamental procedural fairness requires that all persons, disabled or not, be given the same type of judicial access. At trial, all of the party defendants, the doctors potentially liable for causing Darwin's disabled condition, were able to attend the entire trial and assert their fundamental right to be present and aid counsel. They were able to dress nicely, take the witness stand, speak softly, smile humbly, and act in whatever manner, or present any demeanor that they felt appropriate, to aid their defense. The trial judge never questioned their potential likeability or jury appeal as presumptively prejudicing the jury in their favor.

On the other hand, because of Darwin's physical and mental condition, a trial court was allowed to merely presume bias on the part of all potential jurors, based on a stereotypical assumption that a party's disability will prejudice the jury, and thereby disregard Darwin's same basic right. But as Maryland's Chief Judge Bell warns, this "approach permits the elevation of a stereotypical assumption to grounds for involuntarily excluding a party without providing any rational basis for doing so." App., *infra*, 63a.

The Maryland Court goes out of its way to describe its holding as a narrow one (App., *infra*, 29a), because the decision only encroaches on a party's right to attend trial if that party cannot comprehend proceedings or aid counsel. However, a distinction based on mental disability is fraught with dangerous and frightening implications. The Maryland Court has decided that an individual only deserves a constitutional standard of review if he or she has a certain level of comprehension. Will there now be an IQ test to determine who has access to our court system? Will a child under a certain age no longer be allowed to attend trial? How will a trial court decide who is not mentally able to exercise his or her right of presence? Can a mentally retarded person

who is unable to aid counsel, but is not physically disfigured, also be barred from trial? Who is to make that distinction, draw that line? The Maryland Court of Appeals decision is the beginning of a slippery slope, which can only lead to the broad denial of one of our most basic rights.

One only needs to place oneself in the position of Darwin to understand the importance of the constitutional right of presence. It is possible for any one of us to become physically and mentally incompetent as a result of a negligent act. While we are crossing the street in the crosswalk, a negligent driver running a red light could strike us, rendering us mentally disabled. We may no longer be able to make a conscious decision to exercise our constitutional right of presence to redress our grievance, but we are still human, and no less deserving of the right. Thinking of that situation hypothetically, when we are mentally competent, who wouldn't choose to exercise the right to be present at a proceeding that is going to influence the rest of a person's life in that disabled condition? Who isn't offended by the Maryland Court's trivialization of a person's life as comparable to an object, to be exhibited to the jury?

III. THE DECISION OF THE MARYLAND COURT OF APPEALS SERIOUSLY INFRINGES ON DISABLED INDIVIDUALS' STATUTORY RIGHTS PURSUANT TO THE AMERICANS WITH DISABILITIES ACT

As Chief Judge Bell points out in his dissenting opinion, "there is * * * another dimension and significance to this case, namely, the message the rule the majority adopts sends to the disabled." App., *infra*, 66a. The 1990 enactment of the Americans with Disabilities Act reflects a clear statement of our national belief that individuals with disabilities must be integrated into American society and cannot be discriminated

against on the basis of disability. Congress has officially recognized that historically the disabled have encountered discrimination with regard to their rights to equal treatment by society.[9] Congress declared that individuals with disabilities continually encounter discrimination in the form of "segregation" and "outright intentional exclusion," as well as "overprotective rules and policies" and "exclusionary qualification standards and criteria." 42 U.S.C. § 12101(a)(5) (1994). To remedy this inequity, Congress enacted legislation meant to provide a clear and comprehensive national mandate for the elimination of invidious discrimination against the disabled. 42 U.S.C. § 12101(b)(1) (1994). The ADA's intent is to ensure equal opportunity, full participation, and equal access. It seeks to protect anyone who is treated unjustly because of physical or mental impairment.

Title II of the ADA protects the rights of disabled people to have the same public services, programs, and activities as those who are not disabled.[10] *See* 42 U.S.C. § 12132 (1994). The decision to exclude Darwin from attendance at his own trial reflects this kind of discrimination. A trial court's exclusion of a disabled party from his own trial is practically the same as saying: "No disabled allowed." The State of Maryland is telling its disabled citizens: "As far as we are concerned you do not exist." It sends the message that disabled citizens have a lower legal status in society. However, the disabled are as much a part of society as those more fortunate. In fact, a core finding of Congress is that

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[9] After considering a wide range of evidence, Congress found that individuals with disabilities are a discrete and insular minority who face restrictions and limitations resulting from *stereotypic assumptions*, and thus, earn the status of a protected group. 42 U.S.C. § 12101(a)(7) (1994)

[10] This Court has stated that Congress not only required all public entities to refrain from discrimination, additionally, in findings applicable to the entire statute, Congress identified "unjustified 'segregation' of persons with disabilities as a 'for[m] of discrimination.'" *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 583 (1999).

"disability is a natural part of the human experience." 42 U.S.C. § 6000(a)(2) (1994). We cannot ignore disabled individuals' basic rights and disregard them because of "stereotypic assumptions" and unsubstantiated fears.

In light of the ADA findings, exclusion of a party from trial based on a disability is equivalent to discrimination. A proper goal for state and federal courts is to remove from the judiciary unfounded stereotypes and prejudices against the disabled, which have no place in modern society. A trial court should not eliminate a mentally disabled litigant's basic right of presence, unless an overriding objective, necessary and compelling is identified, and the means used to address the court's objective are narrowly tailored. The trial court must conduct adequate fact-finding to determine if a real reason for exclusion exists, based on more than a mere stereotypical assumption of prejudice. Viewing the disabled party is not enough. The trial court must utilize the jury screening process. The trial court must consider reasonable alternatives to courtroom exclusion and exhaust less restrictive means, such as pointed voir dire questions, strikes for cause, and cautionary instructions to ferret out any possible juror prejudice and ensure a fair trial.

Currently, in Maryland a *healthy* person is entitled to be present at all phases of trial, absent waiver or disruption of courtroom proceedings. Likewise, when there has been no showing of articulable prejudice to the opposing party, and less restrictive means to eliminate jury bias have not been exhausted, a constitutionally compelling reason, much less a rational reason, to remove a mentally disabled litigant's basic right to be present does not exist. The proper means to provide a fair trial for *all* litigants is exclusion of a biased juror from the panel, not exclusion of the party from trial.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

SUZANNE C. SHAPIRO
Counsel of Record
Saul E. Kerpelman & Associates, P.A.
10 North Calvert Street, Suite 600
Baltimore, Maryland 21202
(410) 547-0202

Counsel for Petitioners

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APPENDIX

APPENDIX A

IN THE COURT OF APPEALS OF MARYLAND

Circuit Court for Anne Arundel Co.
No. 88

September Term, 1999

DARWIN GREEN, A MINOR, ET AL.

v.

NORTH ARUNDEL HOSPITAL ASSOCIATION, INC., ET AL.

Bell, C.J.
Eldridge
*Rodowsky
Raker
Wilner
Cathell
Harrell,
JJ.

Opinion by Wilner, J.,
Rodowsky, J., concurs and dissents,
Bell, C.J., dissents

Filed: November 27, 2001

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*Rodowsky, J., now retired, participated in the hearing and conference of this case while an active member of this Court; after being recalled pursuant to the Constitution, Article IV, Section 3A, he also participated in the decision and adoption of this opinion.

Before us is a medical malpractice action that commenced in the Circuit Court for Baltimore City but was eventually tried in the Circuit Court for Anne Arundel County. Through his parents, the severely injured plaintiff, Darwin Green, sued respondents, North Arundel Hospital Association (NAHA) and Drs. Richard T. Fields, Stewart P. Axelbaum, and Hashad R. Mody. Because liability was in significant dispute and the injury allegedly resulting from the defendants' conduct was severe, the court bifurcated the case, undoubtedly to avoid potential prejudice to the defendants, and proceeded first on the issues of liability. At the conclusion of the plaintiff's case as to liability, the court dismissed the action against NAHA and Mody on the ground that there was legally insufficient evidence of negligence on their part that contributed to Darwin's injury, and at the end of the entire case on liability, the jury returned a verdict in favor of the other two defendants, Drs. Fields and Axelbaum. The issue of damages was thus never submitted to the jury.

Plaintiff appealed to the Court of Special Appeals, which affirmed the Circuit Court judgments. *Green v. North Arundel Hospital*, 126 Md. App. 394, 730 A.2d 221 (1999). We granted *certiorari* to consider two basic issues: (1) whether the Circuit Courts in Baltimore City and Anne Arundel County properly concluded that venue lay in Anne Arundel County, and (2) whether the trial court erred in precluding Darwin, who, as a result of his injury, was essentially in a motionless vegetative state, unable either to communicate or to understand the proceeding, from being brought into the courtroom for a period of less than an hour during the two-week trial as to liability, to be exhibited to the jury "to demonstrate his current condition." Convinced that there was no error in either regard, we affirm the judgment of the Court of Special Appeals.

BACKGROUND

Darwin Green was born on February 12, 1977 and was 20 at the time of trial. He was born with hydrocephalus – a medical condition in which abnormal accumulation of fluid in the cerebral ventricles causes increased brain pressure. Nine days after birth, a shunt was placed in the right cerebral ventricles of his brain to drain the extra fluid into other parts of his body and thereby relieve the cranial pressure. The shunt was revised once when Darwin was one year old, and a second shunt was placed in his brain at age four. Darwin had a limited intellectual capability but was able to attend school, take special education classes, and go on family vacations.

On the morning of August 17, 1988, Darwin began to experience a headache, which continued despite his taking Tylenol. Later that day, he began to vomit and feel nauseous. His symptoms continued the following day, and he seemed drowsy. Concerned, his father took Darwin to the NAHA emergency room around 11:00 a.m., where Dr. Fields, the physician on duty, examined him at 1:00 p.m. Because Darwin was complaining of a severe headache, Dr. Fields ordered several laboratory tests, including an emergency CT scan. Dr. Axelbaum, a radiologist at NAHA, reviewed and interpreted Darwin's CT scan. He noted the presence of shunts in Darwin's brain and a number of other abnormalities – a subdural hygroma with a calcified cyst causing some mass effect in the left cerebral hemisphere, a large right parietal porecephalic cyst, and possible aqueductal stanosis. Nevertheless, he concluded, and informed Dr. Fields, that those conditions reflected "old" changes. Dr. Fields then consulted with Dr. Hashad R. Mody, a neurologist, who advised that Darwin could be discharged once the headache was relieved. Around 1:30 p.m., Darwin was given a prescription painkiller, Vicodin. By 2:45, the pain was gone, and just after 3:00, he was discharged. Prior to releasing Darwin, Dr. Fields spoke

twice with the child's primary care pediatrician, Dr. Lee, who indicated that he would see Darwin either later that day or the next day for a follow-up. The clinical impression noted on the hospital record was "vascular headache," with an instruction for Darwin to see his primary care pediatrician.

Darwin returned home but continued to complain of headaches. His father gave him another Vicodin tablet that evening. The next morning, August 19, Darwin's headache persisted, and his father took him to Dr. Lee's office in Anne Arundel County. Dr. Lee noted that, in addition to the headache, Darwin appeared drowsy and was staggering. After consulting with Darwin's neurosurgeon, Dr. Lee arranged for Darwin to visit immediately the University of Maryland Hospital (UMH) located in Baltimore City. Darwin and his father arrived at UMH in late afternoon. Upon his arrival, Darwin's shunt was tapped and another CT scan was performed. Doctors at UMH concluded that Darwin had increased intracranial pressure and, therefore, probably had a shunt malfunction, which required surgical correction. At 11:00 p.m., Darwin was admitted to the neurosurgery service of UMH where he remained overnight. The UMH Progress Note revealed that, at 12:30 p.m. the next day, Darwin's status had "acutely deteriorated," and he was moved to the intensive care unit. There, he suffered a cardiac arrest, which left him severely brain-damaged. He was, and remains, in an essentially vegetative state, unable to communicate with anyone, and functions at the level of a one-month old infant.

DISCUSSION

Venue

This litigation began on October 13, 1989, with a claim filed on behalf of Darwin with the Health Claims Arbitration

Office (HCAO).[1] Named as respondents in that claim were NAHA, Dr. Fields, UMH, and 11 health care providers at UMH. Of those respondents, NAHA and Fields resided and did business only in Anne Arundel County. The UMH respondents apparently either resided or did business in Baltimore City. The plaintiff averred that he was injured by negligent medical care on August 19, 1988 in the NAHA emergency room and on August 19-20 while a patient at UMH. While the case was pending before HCAO, plaintiff settled with the UMH respondents and, in exchange for $1,489,000, executed a joint tortfeasor release. The remaining parties then waived arbitration, which terminated the proceeding before HCAO.

Plaintiff commenced the action now before us by filing suit in the Circuit Court for Baltimore City against NAHA and Dr. Fields – the two Anne Arundel County defendants. Those defendants moved to dismiss the action for want of proper venue. Maryland Code, § 6-201(a) of the Courts and Judicial Proceedings Article, provides that, subject to §§ 6-202 and 6-203, "a civil action shall be brought in a county where the defendant resides, carries on a regular business, is employed, or habitually engages in a vocation." Section 6-201(b) adds that, "if there is more than one defendant and there is no single venue applicable to all defendants, under subsection (a), all may be sued in a county in which any one of them could be sued, or in the county where the cause of action arose." Section

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[1] The claimant before HCAO and the plaintiff and petitioner in this action is Darwin. Because of his unfortunate condition, however, he has been unable directly to make any claims or assertions. All of the claims and assertions regarding his physical and medical status at the various relevant times and all of the actions taken in this litigation were made or done on his behalf by either his parents or his attorneys. We shall use Darwin's name when referring specifically to him but otherwise use the term "plaintiff" to refer to Darwin or those acting on his behalf.

6-202(8) provides that a tort action based on negligence may be brought where the cause of action arose. It was not disputed that there was a single venue applicable to both defendants, in Anne Arundel County, and that the alternatives stated in § 6-201(b) were therefore inapplicable. Plaintiff asserted, however, that venue could lie under § 6-202 (8) where the cause of action arose and contended that, under applicable case law, the cause of action arose in Baltimore City.

The court concluded that § 6-202 (8) was inapplicable and that, under the clear mandate of § 6-201(b), venue lay only in Anne Arundel County. Therefore, in March, 1992, it transferred the case to the Circuit Court for Anne Arundel County, which, in July, 1993, set a firm trial date of June 2, 1994. On May 17, 1994 – *two weeks before the scheduled trial date and 26 months after the case was transferred* – the plaintiff moved to stay trial on the ground that he wanted to add two additional defendants – Drs. Mody and Axelbaum. The trial date was postponed and plaintiff filed a new claim with HCAO against the two doctors, who had rendered service in connection with plaintiff's initial visit to NAHA. After arbitration was waived, HCAO transferred the case to the Circuit Court for Anne Arundel County.

Rather than proceeding apace in that court, where the scheduled trial had been postponed to allow the addition of the two doctors, the plaintiff filed a new action against all four defendants in Baltimore City, on the ground that Dr. Mody practiced in the city. The claims asserted against NAHA and Dr. Fields were identical to those pending in Anne Arundel County. Contemporaneously, the plaintiff filed a motion in the Anne Arundel County court to transfer the case against NAHA and Dr. Fields to Baltimore City. NAHA and Dr. Fields moved to dismiss the Baltimore City action and also sought sanctions and attorneys' fees. The Baltimore City court granted the motion and imposed sanctions. The Anne Arundel County

court denied the plaintiff's motion to transfer. Finally, in August, 1996 – more than two years after the case was scheduled to be tried – the plaintiff formally added Drs. Mody and Axelbaum to the Anne Arundel County case. The case proceeded to trial against all four defendants and ended with judgments in their favor.

Plaintiff pursued his claim of improper venue on appeal. The Court of Special Appeals held that the Circuit Court for Baltimore City, in the first proceeding, erred in concluding that § 6-202(8) was inapplicable.[2] The intermediate appellate court went on to hold, however, that the error in that determination was essentially harmless, because the cause of action did not arise in Baltimore City and, for that reason, no venue lay there. The court determined that an action based on negligence arises where the injury *first* occurs. Upon examining the evidence presented by the plaintiff, it concluded that the injury to Darwin first occurred in Anne Arundel County.

The plaintiff applauds the Court of Special Appeals' determination that § 6-202(8) applies and that the Circuit Court for Baltimore City erred in concluding otherwise, but he argues that the intermediate appellate court was wrong in then finding that the action arose in Anne Arundel County. He complains first that, as the Circuit Court made no finding on that issue (which, of course was unnecessary for it to do in light of its ruling that § 6-202(8) was inapplicable), the determination by the Court of Special Appeals constitutes impermissible

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[2] The authority allowing a plaintiff to sue in the county where the cause of action arose is provided in both §§ 6-201(b) and 6-202(8). As noted, the authority contained in § 6-201(b) is limited to the situation in which there is no other single venue applicable to all defendants, which was not the case here. The authority provided by § 6-202(8) is limited to tort actions based on negligence. It provides an additional venue to the plaintiff irrespective of whether venue under § 6-201(b) is available. *See Wilde v. Swanson*, 314 Md. 80, 548 A.2d 837 (1988).

appellate fact-finding. He also disagrees with that finding on the merits. Although acknowledging that a cause of action for medical malpractice arises when the plaintiff first experiences *any* injury from the allegedly negligent acts of a defendant, he maintains that no such injury occurred until he suffered his cardiac arrest in Baltimore City – that the defendants were never accused of causing the headaches or drowsiness that the Court of Special Appeals regarded as the requisite injury.

In *Owens-Illinois v. Armstrong*, 326 Md. 107, 121, 604 A.2d 47, 54 (1992), we concurred with the holding of the Court of Special Appeals in that case that a cause of action in negligence arises when facts exist to support each element of the action. The elements of a cause of action for negligence are (1) a legally cognizable duty on the part of the defendant owing to the plaintiff, (2) a breach of that duty by the defendant, (3) actual injury or loss suffered by the plaintiff, and (4) that such injury or loss resulted from the defendant's breach of the duty. *Brown v. Dermer*, 357 Md. 344, 744 A.2d 47 (2000); *Valentine v. On Target, Inc.*, 353 Md. 544, 727 A.2d 947 (1999). As we noted in *Owens-Illinois*, in a negligence action, the elements of duty, breach, and causation tend naturally to precede the element of injury, which "would seemingly be the last element to come into existence." *Owens-Illinois, supra*, 326 Md. at 121, 604 A.2d at 54. Accordingly, in determining when, in a time sense, a cause of action for negligence arises, the focus is often on when that last element of injury occurs. That, in turn, depends of how we define "injury."

We have opined on that subject on a number of occasions in a variety of contexts. In *Oxtoby v. McGowan*, 294 Md. 83, 447 A.2d 860 (1982), where the issue was whether the plaintiff suffered a "medical injury," and thus had a cause of action for medical malpractice, prior to the effective date of the Health Claims Arbitration Act, we adopted the view of the Wisconsin court that "injury" needed to be looked at in terms of "the effect

on the recipient in the way of hurt or damage" and thus extended to, and included, "any hurtful or damaging effect which may be suffered by any one." *Id.* at 94, 447 A.2d at 866 (quoting from *McManus v. Board of Trustees of Policemen's Pension Fund*, 119 N.W. 806, 807 (Wis. 1909)).[3] We also cited with approval two decisions of the Court of Special Appeals, *Dennis v. Blanchfield*, 48 Md. App. 325, 428 A.2d 80 (1981), *aff'd in part and modified on other grounds*, 292 Md. 319, 438 A.2d 1330 (1982), and *Johns Hopkins Hospital v. Lehninger*, 48 Md. App. 549, 429 A.2d 538 (1981), *cert. denied*, 290 Md. 717 (1981), for the proposition that a medical injury occurs, for purposes of the Health Claims Arbitration Act, "even though all of the resulting damage to the patient has not been suffered prior to the Act's effective date." *Oxtoby*, 294 Md. at 97, 447 A.2d at 868. *See also Hill v. Fitzgerald*, 304 Md. 689, 696, 501 A.2d 27, 30 (1985) (confirming that view in response to certified questions from the United States District Court).

Most instructive with respect to the particular issue before us is *Jones v. Speed*, 320 Md. 249, 577 A.2d 64 (1990). The

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[3] In *Oxtoby*, the plaintiff underwent surgery in 1974 for a complete hysterectomy, due to a concern over the prospect of ovarian cancer. The defendant surgeon allegedly did not remove all of an ovary and fallopian tube, and, in April, 1977, the plaintiff was diagnosed with cancer, which, in 1980, proved to be fatal. Suit against the surgeon was filed in 1980. The Health Claims Malpractice Act, which required all malpractice claims to be submitted to non-binding arbitration prior to any action in court, took effect July 1, 1976, and applied to all medical injuries occurring after that date. The question presented to us was whether Ms. Oxtoby suffered a medical injury prior to July 1, 1976 and therefore was not subject to the procedural requirements of the Act – whether the alleged failure to remove the entire ovary established a complete medical injury at the time of the surgery or not until she actually contracted the cancer. We concluded that it was unnecessary to resolve that issue, as there was evidence in the record that the cancer, though not diagnosed until 1977, was, in fact, contracted prior to July 1, 1976.

plaintiff, Jones, consulted the defendant doctor, Speed, for the first time in July, 1978, complaining of severe headaches and expressing a concern over possible intracranial abnormality. The doctor dismissed that concern and omitted ordering a CT scan or any other diagnostic test of the brain. The headaches continued. Ms. Jones remained under Speed's care and returned for 16 further visits on a semi-annual basis until September, 1985. Although the headaches persisted throughout that time, Speed never ordered a diagnostic test of the plaintiff's brain. In February, 1986, following a nocturnal seizure, a CT scan revealed a brain tumor, which was successfully removed. Jones filed a claim, based on the continuing negligence, in July, 1986. In response, Speed asserted the statute of repose codified in Maryland Code, § 5-109 of the Courts and Judicial Proceedings Article, which requires a medical malpractice action to be filed within five years after the time "the injury was committed."

The complaint contained 17 counts. The first count asserted negligence with respect to the first visit in July, 1978. The remaining 16 counts incorporated the allegations of the first count but asserted separate negligence with respect to each of the ensuing visits, through 1985. We agreed with Speed that all claims based on his failure to order appropriate diagnostic tests and on his failure to detect the tumor more than five years prior to the filing of the complaint were barred. That conclusion necessarily rested on the premise that the pain and disability that Ms. Jones continued to suffer from Speed's failure to correctly diagnose the problem constituted an injury which, when joined with his negligence, gave the plaintiff a cause of action. We concluded further, however, that the claims based on Speed's negligence at the later visits occurring within five years of the filing of the complaint were not barred and could proceed, although we suggested that they be joined

in a single count, in order to avoid *res judicata* and claim-splitting problems.

We most recently considered the question of injury in *Rivera v. Edmonds*, 347 Md. 208, 699 A.2d 1194 (1997), which, like *Jones*, involved the application of the statute of repose provision of § 5-109 to a failure-to-diagnose situation. Biopsy specimens taken by the plaintiff's physician in July, 1983, were allegedly misread by the defendant pathologists, who failed to diagnose invasive carcinoma evident in the microscopic slides. Ms. Edmonds remained free of medical complaints until August, 1988, when her gallbladder was removed. In May, 1989, she complained of severe pain in her right buttock, which the plaintiff's expert witness opined was due to nerve root irritation arising from the spread of a malignant cervical tumor. In October, 1989, a mass was discovered in her right pelvic area, and in November, she was diagnosed as having fully differentiated squamous cancer. She died in 1990. Suit was filed in April, 1993, and was met with the defense under § 5-109, which, on summary judgment, the trial court held was a bar to the action. The issue hinged on when injury occurred from the misdiagnosis.

In examining that issue, we quoted the view of the Court of Special Appeals that

> "The patient could suffer an 'injury' as a result of a negligent misdiagnosis, when (1) he or she experiences pain or other manifestation of an injury; (2) the disease advances beyond the point where it was at the time of the misdiagnosis and to a point where (a) it can no longer effectively be treated, (b) it cannot be treated as well or as completely as it could have been at the time of the misdiagnosis, or (c) the treatment would entail expense or detrimental side effects that would not likely have occurred had

> treatment commenced at the earlier time; or (3) the patient dies."

Id. at 215, 699 A.2d at 1198.

The record indicated that Ms. Edmonds had at least a Stage I cervical cancer – a tumor confined to the cervix – when the misdiagnosis occurred in July, 1983. Although there was a 10-15% chance of lymph node involvement in a Stage I cancer, the extent of any invasion could not be measured. The five-year cure rate in July, 1983 for an invasive cancer, with proper treatment, was 75-85%. By the time the cancer was actually diagnosed in 1989, however, it had progressed to a Stage IV, for which the cure rate was 0. Although the defendants, seeking to establish that the plaintiff had a cause of action immediately, asserted that *any* delay in a failure to diagnose cancer (and certainly a protracted delay) constitutes injury, a view with which we said that "[o]rdinarily we would have no disagreement," we noted that there was evidence that the particular cancer that should have been detected in July, 1983, could remain dormant for as long as five years. Because the case was resolved on summary judgment, we concluded that the plaintiff was entitled to that favorable inference, and, in the absence of any evidence of pain or other manifestation of injury, that there was the reasonable prospect that injury did not occur until July, 1988. We thus affirmed the determination of the Court of Special Appeals that summary judgment was inappropriate.

With this background, we may quickly dispose of plaintiff's complaints that the Court of Special Appeals (1) engaged in impermissible appellate fact-finding, and (2) erred substantively in determining that Darwin suffered injury in Anne Arundel County. The two issues really coalesce, and we need go no farther than the plaintiff's own admissions. He states in his brief:

> "After being released from [NAHA] at 3:05 p.m. on August 18, 1988 Darwin continued to complain of headache and that evening his father gave him another Viacodin as prescribed by Dr. Fields. . . . The next morning, August 19, 1988 Darwin still complained of a headache and his parents took him to his pediatrician, Dr. Lee. . . . Dr. Lee noted that Darwin had a headache, drowsiness and was now staggering, and he immediately arranged for Darwin's parents to take him to University of Maryland Hospital."

That admission is fully supported by the evidence. In answers to interrogatories, the plaintiff averred that, after leaving NAHA and before reporting to UMH the next afternoon, Darwin suffered a continued "neurological deterioration" from the ever-increasing intracranial pressure. Although the plaintiff seeks now to brush it aside, the fact is that, as a result of the alleged negligence of the Anne Arundel County defendants in failing to diagnose the shunt malfunction and have Darwin sent immediately to a facility capable of dealing with that problem, Darwin continued to suffer from headaches, drowsiness, and neurological deterioration. That constitutes a "hurtful or damaging effect" (*Oxtoby*); it is the kind of harm we recognized in *Jones* as constituting an injury; and it clearly falls within the scope of "pain or other manifestation of an injury" under *Rivera*. Clearly, Darwin, through his parents, could have sued the NAHA defendants on August 19, 1988.

It is evident that the Court of Special Appeals reached the only conclusion possible – that "because appellant's own evidence showed that Darwin *first* experienced injury in the form of 'neurological deterioration' and pain and suffering in Anne Arundel County, the cause of action arose in that county." *Green v. North Arundel Hospital, supra*, 126 Md. App. at 414, 730 A.2d at 232. Venue thus lay in Anne Arundel County, and

no error was committed by the Circuit Court for Baltimore City in transferring the case.

Appearance at Trial

Just before trial, both sides filed motions *in limine*. NAHA moved to exclude Darwin's presence from the trial. Plaintiff filed a motion to exclude (1) any evidence or argument concerning the plaintiff's settlement with UMH, and (2) any evidence or argument that UMH or any health care provider other than the defendants was negligent in the care rendered to Darwin. NAHA's motion to exclude, which was supported by the other defendants, was based on the assertion that Darwin was in a vegetative state, unable to communicate, unable to participate or assist in any way with the presentation of his case, unable even to understand what would be transpiring in court, that, in the absence of being able to perform any such function, his presence would be overwhelmingly prejudicial, that he required continuing nursing care and extensive medical equipment, and that the equipment would generate noise and distract the jury. Although acknowledging that Darwin's presence might be relevant to the issue of *damages*, NAHA asserted that his presence was irrelevant to the issue of *liability*. The plaintiff opposed the motion and denied the allegations in the motion.

Although the motion and the response seemed to assume that the plaintiff desired Darwin's presence throughout the trial, at the hearing on the motion, the plaintiff indicated that "he is not going to be sitting here the entire time for trial." It is not clear from the transcript of the hearing how long the plaintiff wished to have Darwin in court. Counsel noted that Darwin required his airway to be suctioned every two hours, but that it was not a noisy process and that Darwin would have a health care professional with him in the courtroom. Although in his appellate brief, the plaintiff now asserts that counsel "only

sought his presence in the courtroom for a period of time less than an hour, on one day of the trial," and, for purposes of this appeal, we shall assume that was the case, such a limitation is not at all clear from the record.[4]

NAHA urged below, and maintains now, that its motion was not based simply on the fact that Darwin's appearance might be upsetting to the jury, but rather that, because of his condition, Darwin was unable to communicate, participate, assist counsel, or even comprehend what would be transpiring, and that, as a result, his presence in the courtroom could have no meaning other than to prejudice the jury against the defendants. In response, the *plaintiff* asked the court to watch a "day-in-the-life" video of Darwin, to observe his condition and his capabilities, which the court proceeded to do. The video, the court said, shows Darwin virtually motionless, except for some eye blinking and some movement during suctioning or changing his feeding tube. At that point, it noted, there is a jerking movement that lifts Darwin's legs and extends his arms above and about the bed. After watching the video and reviewing relevant deposition transcripts and medical

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[4] In making that assertion, the plaintiff cites to pp. 105-06 of the record extract, which is part of the transcript of the hearing on the motion *in limine*. Although counsel did state to the court that Darwin "is not going to be sitting here the entire time for trial," nowhere did he indicate that Darwin's presence was to be limited to less than an hour on one day. The assertion now made, so far as we can tell, finds no support in the record. Although this disparity has no ultimate significance, it presents a somewhat different posture of the case to us than may have been presented to the trial court. If, as the colloquy suggests, the intent was to have Darwin in the courtroom for longer than two hours, the court may well have been concerned about the disruptive effect of suctioning his air tube – the noise and the jerking movement that the court observed on the video. If, as we are now told, the intent was to have him brought in on one day for less than an hour, the implication is even stronger that his presence would simply be as an exhibit, not to implement his Constitutional, statutory, or common law right to be present.

records, the court found as a fact that Darwin did not have the ability to communicate in any fashion with counsel or his parents or nurses, that he would not be able to aid his attorneys in prosecuting the case or offer "any sort of input." The court found further that Darwin would not understand or comprehend any part of the trial. It concluded that Darwin was "reduced to the vegetable state" and that "there can be no purpose in presenting [him] short of prejudice to the Defendants' case."

Although the court recognized that it could not arbitrarily deny a party the right to be present during trial because of the party's appearance and that the defendants had the burden of establishing a basis for excluding Darwin, it concluded that the burden had been met and that, in the liability phase of the trial, the prejudice from Darwin's presence would extend beyond "any instructions that could be offered." For those reasons, it granted the motion. With the acquiescence of the defendants, the court granted the plaintiff's motion to exclude evidence regarding the settlement with UMH but denied the motion to preclude evidence and argument of negligence on the part of UMH or other health care providers.

In this appeal, the plaintiff complains that the exclusion of Darwin from the trial violated his rights (1) under the Americans With Disabilities Act (42 U.S.C. §§ 12101 - 12213 (1994 & Supp. 1999)), and (2) to due process of law under the Federal and State Constitutions. He avers that a trial court "does not have unbridled discretion to exclude a party from the courtroom, and, therefore, the trial court abused its discretion under the circumstances of this case."

Americans With Disabilities Act

The Americans With Disabilities Act (ADA) broadly prohibits discrimination against disabled persons in employment, public services and programs offered by public entities, and public accommodations and services operated by

private entities. We are concerned here with Title II of the ADA, dealing with public services offered by public entities. 42 U.S.C. §§ 12131 - 12165 (1994 & Supp. 1999). Section 12132 states that, subject to the provisions of the subchapter, no qualified individual with a disability may, by reason of that disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by such entity.

Section 12131(1)(B) defines "public entity" as including any agency or other instrumentality of a State or local government, which clearly would include a State court. To date, ADA compliance issues with respect to courts have been principally in the context of requiring that courts make reasonable accommodations in their physical facilities or services to assure that those facilities are accessible to persons with disabilities. *See Layton v. Elder*, 143 F.3d 469, 472-73 (8th Cir. 1998); *Matthews v. Jefferson*, 29 F. Supp. 2d 525, 534 (W.D. Ark. 1998); *Galloway v. Superior Court of the District of Columbia*, 816 F. Supp. 12, 18-19 (D. D.C. 1993); *People v. Caldwell*, 603 N.Y.S.2d 713, 715-16 (N.Y. Crim. Ct. 1993) Whether the exclusion of a disabled person from a civil court trial, not by reason of some physical barrier but in order to avoid disruption or prejudice, would constitute a violation of the ADA is as yet unclear. No case deciding that issue has been cited to us by any of the parties or *amici*, and, like the Court of Special Appeals, we have been unable to find one.

It is not necessary in this case to resolve that issue, however, for, even if we were to conclude that the ADA provides a broader, more absolute right of presence than does the common law or the State or Federal Constitutions, reversal of the judgment and a new trial would not be a remedy for the statutory violation. Section 12133 limits the rights, remedies, and procedures available to a person alleging discrimination in violation of § 12132 to those set forth in 29 U.S.C. § 794a,

which is part of the Vocational Rehabilitation and Other Rehabilitation Services Act, 29 U.S.C. §§ 701 - 796*l* (1994 & Supp. 1999). Section 794a, in turn, deals with two different kinds of disability discrimination complaints – those filed under 29 U.S.C. § 791with respect to Federal employment, and those filed under 29 U.S.C. § 794 regarding discrimination in programs receiving Federal financial assistance. Section 794a does not appear to cover complaints of discrimination in State or local government programs or services that do not receive Federal financial assistance.

There has, of course, been no showing in this case, or even an attempted showing, that either § 791 or § 794 is applicable here. To the extent that § 794 may conceivably be applicable on the basis that our State courts receive some Federal financial assistance, that section provides that the remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d *et seq.*) are available to any person aggrieved by any act or failure to act by a recipient of Federal assistance. Section 2000d-1 authorizes each Federal agency empowered to extend financial assistance to adopt regulations to effectuate the provisions of § 2000d, and specifies that compliance with any agency requirement may be effected by termination or refusal to continue the assistance, or by any other means authorized by law. There is no provision in either Federal or State law, to the best of our knowledge – and none has been cited to us – authorizing the reversal of a judgment in a civil case or the awarding of a new trial as a remedy.

As noted, public entities are subject to the ADA under § 12132 even if they do not receive Federal financial assistance. The remedies for violations, not otherwise covered by § 794a, are set forth in regulations adopted by the U.S. Department of Justice. 28 C.F.R. §§ 35.101 - 35.190 (2001). That department is responsible for receiving complaints of discrimination arising from programs dealing with the administration of justice,

including the courts. *Id.* § 35.190. A person who believes that he or she has been subjected to discrimination on the basis of disability by a court may file a complaint with the Department of Justice, which investigates the complaint and attempts to resolve it informally. *Id.* §§ 35.170 - 35.172. If unable to effect a resolution, the Department issues findings of fact, following which the complainant may file a private lawsuit or the Department may seek voluntary compliance. *Id.* §§ 35.172 - 35.173. If neither occurs, the matter is sent to the U.S. Attorney General "with a recommendation for appropriate action." *Id.* § 35.174.

Nowhere in these regulations is there stated, or even suggested, that, where the complaint concerns the exclusion of a disabled person from the courtroom by judicial ruling, reversal of the judgment entered in the case is a permissible remedy. The entire thrust of the administrative remedial sections is in forcing public entities to make reasonable accommodations in their facilities or in their programs to preclude the wrongful exclusion of persons with disability and are injunctive or forward-looking in nature. The remedies available in a private lawsuit, subject to Eleventh Amendment considerations,[5] may be broader and include compensatory damages and an award of attorney's fees against the public entity, but there is no indication that they would include setting

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[5] Since the decision of the Supreme Court in *Board of Trustees v. Garrett*, 531 U.S. 356, 370-72, 121 S. Ct. 955, 966-68, 148 L. Ed. 2d 866, 882-84 (2001) (holding invalid the attempted abrogation by Congress of the States' Eleventh Amendment right with respect to actions for damages under Title I of the ADA), a serious question has been raised of whether an action for damages may lie against a State under Title II of the ADA. *See Thompson v. Colorado*, 258 F.3d 1241, 1255, 2001 U.S. App. LEXIS 21625 at *36-37 (10th Cir. 2001) and *Jones v. Department of Welfare, Bureau of Blindness and Visual Servs.*, 2001 U.S. Dist. LEXIS 14549 at *10 (E.D. Pa. 2001) (holding invalid the attempted abrogation of Eleventh Amendment right with respect to actions under Title II of the ADA).

aside a judgment in favor of a private party because a disabled person was wrongfully excluded from the courtroom. Indeed, the inappropriateness of such a remedy becomes unmistakably clear when one considers that a violation of the ADA based on wrongful exclusion from a courtroom does not depend on the excluded person's status as a party in the pending case; a member of the public who is excluded from a public courtroom because of his/her disability has the same complaint under the ADA as a party excluded by reason of disability. Surely, it would be inappropriate, and not within the contemplation of Congress, to vacate judgments entered in cases proceeding in the courthouse because a disabled member of the public was wrongfully excluded from entering or remaining in the courthouse or in particular courtrooms.

For these reasons, whether or not the exclusion of Darwin constituted a violation of the ADA, reversal of the judgments is not an acceptable or available remedy.

Constitutional and Common Law Right

In concert with courts throughout the country, we have made clear that a party to civil litigation has a right to be present for and to participate in the trial of his/her case. Although we have not, in our previous cases, specifically identified the source of that right, it is clear that the right emanates, at least, from the common law of Maryland, from the due process clause of the Fourteenth Amendment to the U.S. Constitution, from the Maryland equivalent of that clause, Article 24 of the Declaration of Rights, and from Article 19 of the Declaration of Rights. We have also made clear, as have most other courts in the nation, that the right is not absolute – that there are circumstances in which a civil case may proceed without the attendance of a party and, indeed, with the party excluded. We have not had the occasion, however, to consider

whether exclusion is permissible under the circumstances now before us.

In *Gorman v. Sabo*, 210 Md. 155, 122 A.2d 475 (1956), a nuisance action filed against Mr. and Mrs. Gorman, Mrs. Gorman attended the trial on the morning of the first day but not thereafter. She asked that the case be continued because of her alleged illness, a matter that was in some dispute. The court denied the continuance, and that was one of the issues presented on appeal. Finding no error, we said:

> "It is not claimed in the brief, nor was it at the argument, that the appellants were hurt in fact by the failure of the court to allow a continuance of the case. It is not even claimed that Mrs. Gorman had planned to take the stand or that she would have been a helpful or persuasive witness. It is not said that she would testify as to any fact that was not brought out either on direct or cross examination of any witness. No actual prejudice was claimed, much less shown. *The right of a party to a cause to be present throughout the trial is not an absolute right in a civil case and in the discretion of the court, with due regard to the circumstances as to prejudice, the case may be tried or finished when a party, including a defendant, is absent.*"

Id. at 167, 122 A. 2d at 481 (emphasis added). *See also Casson v. Horton*, 226 Md. 575, 174 A.2d 581 (1961).

The same point was made, although in a different context, in *Safeway Stores, Inc. v. Watson*, 317 Md. 178, 562 A.2d 1242 (1989), an action by an injured employee for judicial review of an unfavorable ruling by the Worker's Compensation Commission. The corporate employer, Safeway, was entitled by Maryland Rule 2-513(a) to designate a representative to remain in the courtroom and be free from sequestration, even

though that representative may be a witness. The rule was intended to put a corporate party in essentially the same position as a natural person in that regard. Safeway, a self-insurer for worker's compensation purposes, designated as its representative an employee of a company retained by Safeway to adjust worker's compensation claims, who had actually worked on the claim in question and who likely would be a witness. The trial court declared that the designated person was not a proper representative and excluded him from the courtroom prior to his testifying. The issue on appeal was whether the trial court committed prejudicial error in so ruling. We held that there *was* error – that the rule gave the corporate party broad latitude in designating its representative and that its determination was not subject to judicial discretion. As to prejudice, we effectively equated the exclusion of the designated representative with the exclusion of a party, and we said, in that regard:

> "We conclude that it is appropriate to presume prejudice from the wrongful exclusion of a party, or its representative, from a trial. Experienced trial attorneys and judges understand the importance of 'humanizing' a corporate defendant in a jury trial. Moreover, a party is entitled to be present to have a firsthand view of the proceedings for purposes of evaluating the constantly changing prospects or exigencies for settlement, and to participate in tactical decisions that must be made, sometimes quickly, in the course of a trial. Finally, the attorney for Safeway was deprived of the presence at his side of the principal investigator in the case. Whether we consider these facts as mounting up to the necessary proof of prejudice by Safeway, or simply consider them in determining that a presumption of prejudice is appropriate in this case, the result is the same. The

> claimant has not overcome the proof or presumption, and the result must be a new trial."

Id. at 184, 562 A.2d at 1245.

What emanates from these cases is that there *is* a right of presence, that the right is not absolute, and that a determination of whether exclusion of a party constitutes sufficient prejudice, either presumed or actual, to warrant a new trial depends, to some extent, on the circumstances. It is significant that, in *Safeway Stores*, we did not reverse summarily simply because of the exclusion but examined, instead, *why* the exclusion was prejudicial. The designated representative was able to comprehend the proceedings and not only assist counsel but help make strategic or tactical decisions regarding the case. This kind of analysis, which also wa evident in *Gorman*, is consistent with the majority view arou d the country, including decisions directly on point to the ma ter now before us.

Dickson v. Bober, 269 Minn. 334, 130 N.W.2d 526 (1964) arose from a collision between a motorcycle, driven by the plaintiff, and an automobile. The young plaintiff was severely injured and was characterized by the court as "one unable to express or sustain himself, helpless and entirely dependent on others, and wholly unable to comprehend trial proceedings." *Id.* at 529. As is the case here, the action was brought on his behalf by his parents, he was represented by counsel, he was excluded from the trial, the jury returned a defendant's verdict, and he complained on appeal that he was denied his Constitutional right to be present. Responding to the plaintiff's citation of cases purporting to hold that a person has an absolute Constitutional right to be in court during his trial, the Minnesota Supreme Court declared:

> "None is authority for the proposition that the plaintiff in a personal injury action who can neither contribute evidence on the question of fault nor comprehend the

> proceedings is entitled as a matter of constitutional right to be present in court when the liability issue is litigated even though fully and adequately represented by counsel."

Id. at 530.

The court went on to note that the plaintiff's rights were protected by his general guardian, who brought the action for him, and by the attorney. It concluded that "the determination of whether a plaintiff unable by reason of his injuries to contribute to or understand the trial proceedings should be permitted, nevertheless, to attend the trial must rest in the sound discretion of the trial court." *Id.*

Similar conclusions have been reached in Arizona, California, Connecticut, Indiana, New York, North Dakota, Oregon, Tennessee, and the U.S. Courts of Appeals for the First and Sixth Circuits. In *Morley v. Superior Court of Arizona, Etc.*, 131 Ariz. 85, 638 P.2d 1331 (1981), the court sustained the exclusion of a severely injured plaintiff, who, as a result of the accident, was in a coma and required a tracheostomy for him to breathe and a feeding tube inserted in his stomach. Following *Dickson, supra*, the court concluded that "[a] plaintiff unable to at least communicate with counsel will have no right denied by exclusion from the courtroom during the liability phase of the trial." *Id.* at 1334. It noted further:

> "If, in addition the plaintiff's physical condition, allegedly caused by the defendant, is so pitiable that the trial court determines the plaintiff's mere presence would prejudice the jury, then failure to exclude the plaintiff during the liability phase would deny the defendant's right to an unbiased jury when the source of the bias is totally irrelevant to the liability issue."

Id.

In *Helminski v. Ayerst Lab., A Div. of A.H.P.C.*, 766 F.2d 208 (6th Cir. 1985), the plaintiff was a surgical nurse who was routinely exposed to a substance, manufactured by the defendant, that was used in surgical anesthetics and that was potentially harmful to fetuses during the early stage of pregnancy. Ms. Helminski was exposed to the product while pregnant and, allegedly as a result, her child was born autistic and retarded. He could not speak and was not toilet trained. The Helminskis sued on the child's behalf and, as here, the trial was bifurcated and the child was excluded from the liability portion.

Analyzing a party's right of presence under the due process clause of the Fifth Amendment (this being a Federal case), the court held that a civil litigant's right of presence was not absolute. It considered three types of cases – those involving a presumably healthy person, those involving the exclusion of a party due to physical injuries, and those in which the excluded party is unable to comprehend the proceedings or aid counsel. As to the first group, although the rule is usually articulated as a right to be present either in person or through counsel, the court made clear that representation by counsel does not justify the arbitrary exclusion of a litigant "who wishes to be personally present in the courtroom." *Id.* at 214. Essentially the same view was taken with respect to the second group of cases. Relying on *Carlisle v. County of Nassau*, 64 A.D.2d 15, 408 N.Y.S.2d 114 (1978), *Purvis v. Inter-County Telephone & Telegraph Co.*, 203 So. 2d 508 (Fla. App. 1967), *cert. denied*, 210 So. 2d 223 (Fla. 1968), and *Florida Greyhound Lines, Inc. v. Jones*, 60 So. 2d 396 (Fla. 1952), the *Helminski* court held that "a plaintiff's physical condition alone does not warrant his exclusion from the courtroom during any portion of the proceedings." *Id.* at 215.

The third group, exemplified by *Dickson* and *Morley*, the court found persuasive, within some limits. The court first set

the general rule that, consistent with due process, "a plaintiff who can comprehend the proceedings and aid counsel may not be excluded from any portion of the proceedings absent disruptive behavior or a knowing and voluntary waiver," and that includes a plaintiff with a "solely physical abnormality . . . even when the abnormality is due allegedly to the defendant's wrongful conduct." *Id.* at 217. Turning then to the issue of prejudice, the court observed that "[t]he benchmark of our judiciary rests on the ability of the courts to provide all parties with a fair trial," and that the court must safeguard the jury's ability to decide the case based on the evidence presented rather than on emotional factors." *Id.* In that regard, the court noted that, although the mere sight of a severely injured plaintiff may evoke jury sympathy, "juror sympathy alone is insufficient to establish juror prejudice" for, generally, a jury will follow the court's instructions and decide the case solely on the facts. It added, however:

> "On the other hand, there may be occasions when the mere presence of a party would render the jury unable to arrive at an unbiased judgment concerning liability. Should such a case arise and the presence of the party would not aid the fair administration of justice, the trial court can exclude the plaintiff or limit his presence. A party's involuntary exclusion under these circumstances would not constitute a denial of due process."

Id.

In the particular case, the trial judge excluded the plaintiff solely on the basis of his described condition, without ever observing the child to determine whether his presence would result in prejudice. Even defense counsel acknowledged that the child's appearance was normal. Exclusion under that

circumstance, the appellate court held, was wrong. It was not, however, reversible error. The court explained:

> "If there is any indication that the plaintiff's presence could have assisted in the presentation of his case, we believe that his exclusion would require reversal. Under the facts of this case, however, where the Helminskis acted as Hugh's next friends and legal representatives, where all parties agree that Hugh was completely unable to comprehend the proceedings, and where Hugh because of his extremely low IQ could not aid his attorney in any meaningful way, we conclude that Hugh's exclusion does not constitute reversible error."

Id. at 218. *See also In Re Richardson-Merrell, Inc.*, 624 F. Supp. 1212 (S.D. Ohio 1985) in which the court explained, as the basis for excluding severely injured plaintiff-children from the liability phase of a product liability case, that the children could neither testify nor meaningfully consult with counsel and that:

> "A fair trial contemplates fairness to both sides. In accordance with [Federal Rule of Evidence] 403 a trial judge must always balance probative value against prejudicial effect, confusion of the issue or misleading the jury. The probative value of a deformed child or children in the courtroom on an issue of liability alone is nonexistent. The unfair prejudicial effect of the presence of that child is beyond calculation."

Id. at 1224.

We need not prolong this opinion with like quotations from other cases. *See Gage v. Bozarth,* 505 N.E.2d 64 (Ind. App. 1987); *Bremner v. Charles*, 312 Or. 274, 821 P.2d 1080

(1991); *Burks v. Harris*, 1992 WL 322375, 1992 Tenn. App. LEXIS 913 (Tenn. Ct. App. 1992); *Province v. Center for Women's Health & Family Birth*, 20 Cal. App. 4th 1673, 25 Cal. Rptr.2d 667 (1993); *Caputo v. Joseph J. Sarcona Trucking Co.*, 204 A.D.2d 507, 611 N.Y.S.2d 655 (A.D. 1994); *Reems v. St. Joseph's Hosp.*, 536 N.W.2d 666 (N.D. 1995); *Wozniak v. New Britain General Hospital*, 2001 WL 717497, 2001 Conn. Super. LEXIS 1547 (2001); and *cf. Gonzales-Marin v. Equitable Life Assur. Soc.*, 845 F.2d 1140 (1st Cir. 1988).

There are, indeed, decisions holding that the exclusion of a party from a civil trial was error, but none of them involved the situation of a party who was (1) wholly unable to communicate or assist in the presentation of the case, (2) incapable of comprehending the proceeding, and (3) excluded only from the liability phase of a bifurcated trial, where his/her presence would likely be both prejudicial to the defendant and irrelevant, in an evidentiary sense, to any issue then before the jury.

A typical case in this regard, often cited, is *Cary v. Oneok, Inc.*, 940 P.2d 201 (Okla. 1997), where the plaintiff was a young child who was severely burned when a water heater in his parents' garage exploded. On motion of the defendant, the child, who was six-and-a-half at the time of trial, was excluded from the courtroom during the liability phase of the trial solely on the ground of his physical appearance – that it would prejudice the jury. The Oklahoma Supreme Court reversed, holding that "[a] Party's physical appearance cannot be the sole basis for exclusion from the courtroom, and does not amount to an 'extreme circumstance' permitting exclusion." *Cary*, 940 P.2d at 204. Although the court noted that jury sympathy could not always be translated into jury prejudice and that the Americans With Disabilities Act added a new dimension to the issue, it also concluded that the record was not clear that the child "could not meaningfully comprehend what was going on"

and that the defendant failed to show that the child "would have been of no assistance to his attorney." *Id.* at 205, 206. Despite his tender age, the child had a recollection of the event. *Id.* at 206. The court distinguished the harmless error holding of *Helminski* on the ground that, in that case, the child was developmentally retarded from birth, was autistic, could not speak, and required constant care, whereas the plaintiff in *Cary* was a normal six-year old but for his burns and scars. *Id. See also Florida Greyhound, supra*, 60 So. 2d 396, 397 (no error in *allowing* injured plaintiff to attend non-bifurcated trial, where it was not clear that plaintiff could not understand the proceeding or assist in some way) and *Talcott v. Holl*, 224 So. 2d 420, 421-22 (Fla. App. 1969) (same; plaintiff actually testified), but compare *Purvis, supra*, 203 So. 2d 508, 511 (plaintiff has right to be present "in absence of a showing that he was incompetent or so incapacitated that he could not comprehend the trial proceedings") and *Freeman v. Rubin*, 318 So. 2d 540, 544 (Fla. App. 1975) (same).

We believe that the appropriate analysis in a case such as this is that employed by the *Helminski* court. There *is* a right of presence, and it may not be denied, even in the liability phase of a bifurcated trial, solely because the party's physical appearance may engender jury sympathy. The right is not absolute, however. It must be balanced against the defendant's equivalent right to a fair trial. Our holding is a narrow one. In the liability phase of a bifurcated trial, the court has discretion to exclude a plaintiff where, after a hearing and an opportunity to observe the plaintiff, either in person or by other reliable means, the court determines, on the record, that: (1) the plaintiff is severely injured; (2) the plaintiff attributes those injuries to the conduct of the defendant(s); (3) there is a substantial prospect that the plaintiff's presence in the courtroom may cause the jury to side with the plaintiff out of emotional sympathy rather than on the evidence; (4) the

plaintiff is unable to communicate or participate in the trial in any meaningful way; *and* (5) the plaintiff would be unable even to comprehend the proceeding. When all of those circumstances exist, as they did here, the plaintiff's presence is not truly an exercise of his/her right of presence, for the plaintiff is incapable of making a conscious decision in that regard. His presence is rather as an exhibit – a piece of evidence – that is both irrelevant and prejudicial, and thus invokes the balancing process enunciated in Maryland Rule 5-403. There was no abuse of discretion here.

JUDGMENT OF THE COURT OF SPECIAL APPEALS AFFIRMED, WITH COSTS.

Concurring & Dissenting Opinion by Rodowsky, J.

Filed: November 27, 2001

Rodowsky, J., concurring in part and dissenting in part.

I join the opinion of the Court on the venue issue, and I join in Part III of the dissenting opinion by Chief Judge Bell on the issue of the plaintiff's exclusion from the courtroom.

Dissenting opinion follows:

Dissenting Opinion by Bell, C. J.,
part III of which is joined by Rodowsky, J.

Filed: November 27, 2001

Today, the majority holds that a plaintiff, who is disabled and has not waived the right to be present in court, may be excluded from the liability phase of his civil action even though his presence would not be disruptive.[1] In addition, it concludes that, in this case, venue lay in Anne Arundel County, the plaintiff having first experienced injury in the form of "neurological deterioration" and pain and suffering in that County. The majority reasons that this conclusion is inescapable because of the plaintiff's own admission, in answering an interrogatory:

> "After being released from [NAHA] at 3:05 p.m. on August 18, 1988 Darwin continued to complain of headache and that evening his father gave him another Viacodin as prescribed by Dr. Fields. ... The next morning, August 19, 1988 Darwin still complained of a headache and his parents took him to his pediatrician, Dr. Lee .... Dr. Lee noted that Darwin had a headache, drowsiness and was now staggering, and he immediately arranged for Darwin's parents to take him to University of Maryland Hospital."

In so ruling, the majority affirms the judgment of the Court of Special Appeals, which, in turn, affirmed the judgment of the

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[1] The Petition for Certiorari filed by the plaintiff and his parents, the petitioners, framed the issue in terms of a violation of the Americans With Disabilities Act, 42 U.S.C. §§ 12101-213 (1994 & Supp. 1999), and whether the plaintiff's exclusion from the liability phase of his trial violated the United States and Maryland Constitutions. The Court *sua sponte* requested that the parties address whether the trial court has discretion to exclude a party and, if so, whether that discretion was abused in this case.

Circuit Court for Anne Arundel County.[2] *Green v. North Arundel Hospital Ass'n, Inc.*, 126 Md. App. 394, 730 A.2d 221 (1999). In my opinion, the majority is wrong on both accounts.

I.

Darwin Green was born with a medical condition called hydrocephalus, in which excessive accumulation of fluid causes increased pressure on the brain. Shortly after he was born, a shunt[3] was placed in the right ventricle of his brain to release the pressure caused by the build up of intracranial fluid by draining the extra fluid to another part of his body. Darwin responded well to the placement of the shunt and, although he had previously experienced a problem with the shunt and his intellectual capability was somewhat limited, he was able to attend special education classes and function reasonably well.

The events giving rise to this action occurred when Darwin was eleven years old. He complained of a headache and began vomiting and feeling nauseous. Concerned, his father took him

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[2] The petitioners have never challenged the Court of Special Appeals,' and now this Court's, interpretation of Maryland Code (1973, 1998 Repl. Vol.), § 6-202(8) of the Courts and Judicial Proceedings Article, as permitting tort actions to be brought "where the cause of action arises" or its holding that "where the cause of action arises is the place where all the elements of the negligence claim (duty, breach, causation, and injury) are satisfied. In negligence cases, because injury is the last element to come into existence, a cause of action in negligence arises where the injury first occurs." *Green v. North Arundel Hosp. Ass'n, Inc.*, 126 Md. App. 394, 408, 730 A.2d 221, 228 (1999). Indeed, they embrace both the interpretation and the holding as absolutely correct. Their disagreement is with the conclusion that "Darwin first experienced injury in the form of 'neurological deterioration' and pain and suffering in Anne Arundel County, [and, thus,] the cause of action arose in that county." *Id.* at 414, 730 A.2d at 232.

[3] A shunt is a mechanical excreting device used to bypass or divert accumulations of fluid. *See* Stedman's Medical Dictionary 1282 (24th ed. 1982).

to the emergency room of North Arundel Hospital Association, Inc. ("NAHA"), where Dr. Richard T. Fields was the emergency room physician on duty. Dr. Fields ordered an emergency CT scan, which was interpreted by Dr. Stewart P. Axelbaum, a radiologist. Although Dr. Axelbaum observed, and noted the presence of, shunts in Darwin's brain as well as a number of other abnormalities, including an old hygroma and a porencephalic cyst, he interpreted those abnormalities as old changes, consistent with pathology related to congenital malfunctions. Dr. Fields also consulted, by telephone, Dr. Harshad R. Mody, the neurologist on call for the hospital. Dr. Mody opined that Darwin could be discharged when his headache subsided. Darwin was discharged without a shunt malfunction having been diagnosed when, after taking a pain medicine prescribed by Dr. Fields, he reported that his headache was gone.

After his release from NAHA, Darwin again complained of a headache and he continued to do so. Therefore, at the direction of his pediatrician, whom he consulted the next day at the suggestion of Dr. Fields, he was taken to the University of Maryland Hospital ("UMA"), where his condition was correctly diagnosed. Before the doctors at UMA operated to correct the condition, however, Darwin went into cardiac arrest, which left him in a chronic vegetative state.

Darwin, by his parents, and his parents filed in the Circuit Court for Baltimore City a medical malpractice action naming Dr. Fields and NAHA, two of the respondents, as defendants. In the suit, they alleged that the respondents' negligence caused Darwin's injuries, that the respondents breached the applicable standard of care by failing to diagnose the alleged malfunction of the shunt in Darwin's brain, and that a proper diagnosis would have prevented his subsequent cardiac arrest. After a hearing, the Baltimore City court determined that Anne Arundel County, not Baltimore City, was the proper venue,

noting that the cause of action arose, and both NAHA and Dr. Fields conducted business solely, in Anne Arundel County and also that Dr. Fields resided there.[4] The case was subsequently transferred to Anne Arundel County.

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[4] As to this ruling, the Court of Special Appeals commented:

> "All parties agree with Judge Rombro's finding that, at the time the complaint was filed in Baltimore City, both NAH[A] and Dr. Fields were Anne Arundel County residents who maintained their offices and conducted their business solely in that County. As such, neither party disputes that Anne Arundel County was the only proper venue under CJ § 6-202 because it provided "a single venue applicable to all defendants." Nevertheless, appellants note that CJ §§ 6-202(8) provides an alternative venue in negligence actions, allowing plaintiffs to bring suit in the county where the cause of action arose."

Green v. North Arundel Hosp. Ass'n, Inc., 126 Md. App. at 406, 730 A.2d at 228. The court cited *Wilde v. Swanson*, 314 Md. 80, 92, 548 A.2d 837, 842 (1988), for the proposition that when multiple venues are proper under Maryland Code (1973, 1998 Repl. Vol.), §§ 6-201 and 6-202 of the Courts and Judicial Proceedings Article, the plaintiff can choose to proceed under either section.

Section 6-201 provides:

> "(a) Civil Actions. – Subject to the provisions of §§ 6-202 and 6-203 and unless otherwise provided by law, a civil action shall be brought in a county where the defendant resides, carries on a regular business, is employed, or habitually engages in a vocation
>
> (b) Multiple Defendants. – If there is more than one defendant, and there is no single venue applicable to all defendants, under subsection (a), all may be sued in a county in which any one of them could be sued, or in the county where the cause of action arose."

As relevant, § 6-202 instructs:

> "In addition to the venue provided in § 6-201 or § 6-203, the following actions may be brought in the indicated county:
>
> * * *
>
> (8) Tort action based on negligence – Where the cause of action arose . . . ."

While pending in the Circuit Court for Anne Arundel County, two additional defendants, Drs. Axelbaum and Mody, the latter of whom regularly conducted business and maintained an office in the City of Baltimore, were joined in the proceedings. This did not occur until after the petitioners' second medical malpractice action filed in the Circuit Court for Baltimore City, this one naming Drs. Mody and Axelbaum, in addition to Dr. Fields and NAHA, as defendants, and also setting forth the same claims against NAHA and Dr. Fields as already were pending in the Circuit Court for Anne Arundel County, had been dismissed[5] and their motion to transfer the case back to Baltimore City had been heard and denied.[6] Thereafter, the trial court bifurcated the liability and damages issues and set a trial date as to the former.

The respondents moved *in limine* to exclude the plaintiff from the courtroom during the liability phase of the trial. The respondents relied on the plaintiff's physical disability and the medical evidence concerning the nature and extent of his physical condition. The respondents described Darwin as being, or likely to be, wheelchair bound, with a tracheotomy

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5 In addition to dismissing the case, the Circuit Court for Baltimore City imposed sanctions on the petitioners' counsel. Neither of the rulings was appealed. No issue has been made, or presented, in this appeal as to the effect of the Circuit Court for Baltimore City's dismissal of the second Baltimore City case, in which Dr. Mody was named as a defendant.

6 To the Court of Special Appeals, it was important to the correctness of the Circuit Court for Anne Arundel County's venue ruling that Dr. Mody, whom everyone conceded provided a basis for venue being set in Baltimore City, was not added as a defendant until after the ruling on the motion to transfer to Baltimore City and that the motion to transfer was not renewed after Dr. Mody was added. Dr. Mody certainly subscribes to that view; in fact, that is essentially his argument in support of affirmance of the venue decision as to him. To the petitioners, Dr. Mody's joinder and their failure to renew the motion to transfer after his joinder simply are irrelevant, the critical issue being the determination of where Darwin's injury occurred.

that allowed him to breathe through a hole in his neck, a feeding tube, and an ambubag to provide supplemental oxygen, and requiring assistance by periodic suctioning. They argued, and they reiterated on appeal, that because Darwin's mere appearance before the jury at trial would prejudice them, his exclusion was permissible within the trial court's discretion and did not contravene the ADA or the federal and state constitutions. In further support of their argument, the respondents emphasize that Darwin is in a chronic vegetative state and, therefore, "will not be able to understand the proceedings. He will not be able to communicate with his counsel. He will not have any meaningful participation in that form."

The Circuit Court granted the respondents' motion. After considering the arguments and viewing a videotape of a day in the life of Darwin, it found that Darwin was virtually motionless and had to be fed by a feeding tube and suctioned from the neck every two hours. Moreover, the court determined that Darwin did not have the ability to communicate with his attorneys, nurses, or parents; that he would be unable to provide any assistance to his attorneys in preparing his case; and that he would not understand or comprehend any portion of either the trial proceedings or the pleadings.[7] It therefore concluded that Darwin's presence in court would serve no other purpose than to be highly prejudicial, to prejudice the jurors against the respondents.

The case was tried on the merits and ultimately presented to the jury for a decision on liability. The court having granted NAHA's and Dr. Mody's motions for judgment, made at the conclusion of the plaintiff's case, the jury returned a verdict in

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[7] The court specifically rejected the petitioners' argument that it is not known whether Darwin could understand the process, noting that any such ability to understand "is not conveyed in any fashion to his parents or to the attorneys that will be representing him."

favor of the respondents, Drs. Fields and Axelbaum, concluding that neither "departed from accepted standards of care in the treatment of Darwin Green."

The Court of Special Appeals affirmed. It applied the analysis employed by the United States Court of Appeals for the Sixth Circuit in *Helminski v. Ayerst Lab.*, 766 F.2d 208 (6th Cir. 1985), in resolving the propriety of the exclusion of a civil plaintiff from trial. In addition, the intermediate appellate court noted that, "[e]ven if we were to have decided that [the petitioner] should not have been excluded from the courtroom, appellants have failed to show that the error was prejudicial," because "[i]f present during every minute of the trial, his presence could not have affected the answer to [the] standard of care question." *Id.* at 423, 730 A.2d at 237.

The majority agrees that the appropriate analysis is that of the *Helminski* court. Op. at 655 (*sic* correct page 625). Characterizing it's holding as "a narrow one," the majority announces:

> "In the liability phase of a bifurcated trial, the court has discretion to exclude a plaintiff where, after a hearing and an opportunity to observe the plaintiff, either in person or by other reliable means, the court determines, on the record, that: (1) the plaintiff is severely injured; (2) the plaintiff attributes those injuries to the conduct of the defendant(s); (3) there is a substantial prospect that the plaintiff's presence in the courtroom may cause the jury to side with the plaintiff out of emotional sympathy rather than on the evidence; (4) the plaintiff is unable to communicate or participate in the trial in any meaningful way; *and* (5) the plaintiff would be unable even to comprehend the proceeding. When all of those circumstances exist, as they did here, the plaintiff's presence is not truly an

> exercise of his/her right of presence, for the plaintiff is incapable of making a conscious decision in that regard. His presence is rather as an exhibit – a piece of evidence – that is both irrelevant and prejudicial, and thus invokes the balancing process enunciated in Maryland Rule 5-403."

Id. at 626-27.

II.

Venue describes the proper court in which to bring an action. Under Maryland Code (1973, 1998 Repl. Vol.), §§ 6-201 and 6-202 of the Courts and Judicial Proceedings Article, venue is proper in the county where the defendant resides, carries on a regular business, is employed, habitually engages in a vocation, or where the cause of action arose. Thus, a plaintiff may bring his or her action in any county where any one of the prerequisites apply. The petitioners initiated their action in the Circuit Court for Baltimore City. That court determined that Anne Arundel County, and not Baltimore City, was the proper venue, ruling:

> "[I]t is clear to me that the cause of action arose in Anne Arundel County. The defendants are all residents of Anne Arundel County.
>
> The fact that the result of their negligence became apparent in some other jurisdiction doesn't transfer the jurisdiction to that county or subdivision as the case may be."

When pressed as to whether the ruling was that Darwin could have sued NAHA for damages, noting that such a determination was "an issue of fact based on the allegations," the court clarified that it "found that the negligence occurred in

Anne Arundel County." It transferred the case to Anne Arundel County and the petitioners challenged that ruling on appeal arguing, in particular, that the cause of action arose in Baltimore City.

In addressing that issue, the Court of Special Appeals perceived the critical issue to be the meaning of the phrase, "where the cause of action arose," as used in §§ 6-201 (b) and 6-202 (8). On that point, the respondents successfully argued to the Baltimore City Circuit Court that venue in a tort action or a contract action arises where the alleged breach occurs. The intermediate appellate court rejected that argument, after applying the same analysis to the determination of *where* the cause of action arose as applies to the determination of *when* it arose. The court thus reversed the judgment of the Baltimore City court on that point. Nevertheless, it proceeded to address the merits of the petitioners' argument with respect to where the cause of action arose.

Critical to that determination was the meaning of "injury" as used in the statutes. In search of a viable definition, the Court of Special Appeals adopted the definition enunciated in *Edmonds v. Cytology Services*, 111 Md. App. 233, 681 A.2d 546 (1996) *aff'd sub nom.*, *Rivera v. Edmonds*, 347 Md. 208, 699 A.2d 1194 (1997):

> "'A patient sustains an 'injury' . . . when, as a result of the tort, he or she first sustains compensable damages that can be proven with reasonable certainty. Therefore, the patient could suffer an 'injury' as a result of a negligent misdiagnosis, when (1) he or she experiences pain or other manifestation of an injury; (2) the disease advances beyond the point where it was at the time of the misdiagnosis and to a point where (a) it can no longer effectively be treated, (b) it cannot be treated as well or as completely as it could

> have been at the time of the misdiagnosis, or (c) the treatment would entail expense or detrimental side effects that would not likely have occurred had treatment commenced at the earlier time; or (3) the patient dies. This is not, of course, an exhaustive checklist; the overriding inquiry in all cases must be when the patient first sustained legally compensable damages. In any event, the injury occurs, as we have observed, when legally compensable tort damages *first* occur, regardless of whether those damages are discoverable or undiscoverable.'"

Green, 126 Md. App. at 412, 730 A.2d at 231 (citations omitted). Based on this definition and the petitioners' contention, made in response to an interrogatory, that "[a]t the time [Darwin] was in the care of the Defendants at North Arundel Hospital, the child's intracranial pressure was constantly increasing causing neurological deterioration moving him inevitably toward and ultimately causing massive brain injuries," the intermediate appellate court rejected the petitioners' argument and agreed with the respondents,' holding "that Darwin first suffered injury in Anne Arundel County." *Id.* at 412, 730 A.2d at 231.

The Circuit Court for Baltimore City had determined that Darwin's cause of action arose in Anne Arundel County, not because his injury manifested there, but because the alleged negligence occurred there. The Court of Special Appeals rejected that determination, holding instead, as the petitioners argued, that it is the occurrence of the injury that is dispositive. Rather than remanding the case for a new trial on that point, however, the intermediate appellate court determined the issue itself. In so doing, it erred. And the majority compounds the error by affirming.

The meaning of the word "injury" in the context of a misdiagnosis is, indeed, at the crux of any case involving where a cause of action arose. In such a case, the issue to be decided is exactly where the injury occurred, for the answer to that question is a necessary predicate to determining where the cause of action arose. This Court has considered this issue in the context of determining the applicability of the Health Care Malpractice Claims Act (HCMCA), Maryland Code (1976, 1998 Repl. Vol.) §§ 3-2A-01 through 3-2A-09 of the Courts and Judicial Proceedings Article, *see Oxtoby v. McGowan*, 294 Md. 83, 447 A.2d 860 (1982); *see also Johns Hopkins Hosp. v. Lehninger*, 48 Md.App. 549, 429 A.2d 538 (1981); *Dennis v. Blanchfield*, 48 Md. App. 325, 428 A.2d 80 (1981), and of Maryland Code (1987, 1998 Repl. Vol.), § 5-109 of the Courts Article, Maryland's statute of limitations for medical malpractice claims.[8] *See Rivera v. Edmonds*, *supra*, *Jones v. Speed*, 320 Md. 249, 577 A.2d 64 (1990); *Hill v. Fitzgerald*, 304 Md. 689, 501 A.2d 27 (1985). We have concluded that "'injury' refers to legally cognizable wrongs or damage arising or resulting from the rendering or failure to render health care" and is "concerned with the invasion of legally protected interests coupled with harm." *Oxtoby*, 294 Md. at 94, 447 A.2d at 866. *See also Hill*, 304 Md. at 695-96, 501 A.2d at 30-31.[9] As the *Oxtoby* Court indicated, this definition is consistent

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[8] Maryland Code (1974, 1984 Repl. Vol.), § 5-109 of the Courts Article provides:

> "An action for damages for an injury arising out of the rendering of or failure to render professional services by a physician shall be filed (1) within five years of the time the injury was committed or (2) within three years of the date when the injury was discovered, whichever is the shorter."

[9] At issue in *Oxtoby* was section 5 of Ch. 235, Acts of 1976, which provided that the Health Care Malpractice Claims Act adopted by Ch. 235 "shall take effect July 1, 1976, and shall apply only to medical injuries occurring on or after that date." In *Hill*, the Court construed §2 of Chapter

with the discussion of the word by the Wisconsin Supreme Court in *State ex rel. McManus v. Board of Trustees of Policemen's Pension Fund*, 138 Wis. 133, 119 N. W. 806, 807 (1909):

> "'The word 'injury,' in ordinary modern usage, is one of very broad designation. In the strict sense of the law, especially the common law, its meaning corresponded with its etymology. It meant a wrongful invasion of legal rights and was not concerned with the hurt or damage resulting from such invasion. It is thus used in the familiar law phrase *damnum absque injuria*. In common parlance, however, it is used broadly enough to cover both the *damnum* and the *injuria* of the common law, and indeed is more commonly used to express the idea belonging to the former word, namely, the effect on the recipient in the way of hurt or damage, and we cannot doubt that at this day its common and approved usage extends to and includes any hurtful or damaging effect which may be suffered by any one.'"

294 Md. at 94, 447 A.2d at 866.

Generally, the determination of when an "injury" occurs is a question of fact, *Rivera*, 347 Md. at 220-25, 699 A.2d at 1201-02; *Hill*, 304 Md. at 697, 501 A.2d at 31, the guide for which is the date on which the alleged negligent act was first coupled with harm. *Hill*, 304 Md. at 697, 501 A.2d at 31.

545, Acts of 1975, which provided that Maryland Code (1974, 1995 Repl. Vol.), § 5-109 of the Courts and Judicial Proceedings Article, enacted by that Chapter, "shall apply only to injuries occurring after July 1, 1975." We have held that there is "no substantive distinction in the legal application" of "injuries occurring" for purposes of the Act and "medical injuries occurring" for purposes of the Health Care Malpractice Claims Act. *Hill*, 304 Md. at 697, 501 A.2d at 30-31.

Consequently, an injury may occur even though the patient has not then suffered all of the damage that may result from the negligent act. *Oxtoby*, 294 Md. at 97, 447 A.2d 860, interpreting *Lehninger*, *supra.*, 48 Md. App. 549, 429 A.2d 538. The test that the Court of Special Appeals enunciated in *Edmonds v. Cytology Services*, *supra*, has been acknowledged by this Court. *See Rivera*, 347 Md. at 215-23, 699 A.2d at 1198-1202 (affirming that court's application of the rule of *Hill v. Fitzgerald*).

In *Edmonds v. Cytology Services*, the intermediate appellate court vacated the trial court's grant of summary judgment, reasoning:

> "[Plaintiffs] did not proffer any expert opinion that Ms. Edmonds's cancer had not spread at any time prior to April 9, 1988 (i.e., the date five years prior to the filing of the claim) or April 11, 1985 (i.e., the date five years prior to Ms. Edmonds's death). But [Defendants] did not advance any evidence, beyond conclusory assertions, to show that Ms. Edmonds's cancer had advanced during those time periods. Nor do [Defendants] contend that Edmonds suffered any symptoms from the cancer prior to August 1988. Therefore, we conclude that the circuit court erred...."

111 Md. App. at 272, 681 A.2d at 565. Significantly, agreeing with the Court of Special Appeals, this Court pointed out:

> "[T]he evidence most favorable to the party opposing summary judgment is that the cancer that allegedly should have been detected in Mrs. Edmonds in July 1983 could remain dormant for as long as five years. The inference most favorable to the plaintiff is that there are no additional adverse consequences if the microscopic tumor remains unchanged. The Defendants have not attempted to demonstrate that

> [the plaintiff's expert's] statement is junk science. Nor did the Defendants develop from him the probability of the undiagnosed condition's remaining dormant for five years."

Rivera, 347 Md. at 223, 699 A.2d at 1202.

Here, the Circuit Court for Baltimore City made no findings of fact as to when the injury suffered by Darwin occurred. Indeed, the court was adamant that it did not have to make any such findings of fact.[10] And, of course, where the injury occurred for venue purposes was not the issue at trial. Nor was the ground relied upon by the Court of Special

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[10] This is reflected in the following colloquy:

"MR. KERPLEMAN: Your Honor, may I ask a question, just for the record? Is the Court finding that at that instant that the child left the hospital that he, in fact, did have a –

THE COURT: Mr. Kerpleman, I –

MR. KERPLEMAN: – that he could have sued –

THE COURT: I've said –

MR. KERPLEMAN: North Arundel Hospital?

THE COURT: I don't have to decide that, Mr. Kerpleman. I've said what I –

MR. KERPLEMAN: Well, I think you do, Your Honor. As a predicate to your decision you must have decided that at the instant he left Anne Arundel Hospital, he could have sued North Arundel Hospital, and I just want clear on the record if that is your finding.

THE COURT: I don't have to –

MR. KERPLEMAN; Because it's an issue of fact based on the allegations.

THE COURT: Mr. Kerpleman, I don't have to make such a finding. I found that he negligence occurred in Anne Arundel County. That's where it happened, nd that's the proper venue for the suit.

MR. KERPLEMAN: Irrespective of where the injury occurred?

THE COURT: I don't want to argue the point with you ...."

Appeals argued by the respondents either in the trial court or in the intermediate appellate court. Thus, as the petitioners maintain, the Court of Specials Appeals made a finding of fact as to when the injury occurred. The majority has now done the same. That is not part of the appellate function.

In any event, that finding of fact is error under the test of *Edmonds v. Cytology Services*. That test provides alternative methods, depending upon the existing circumstances, of determining when an "injury" has occurred. To be sure, one alternative applies when the plaintiff experiences pain or other manifestation of an injury. But that alternative must be juxtaposed against the alternative that applies when the injury has progressed beyond the point at which it was at diagnosis, such that it cannot then be treated or treatment would be more difficult or expensive. The latter alternative must apply to the situation in which the misdiagnosis is of an asyptomatic injury. Logically, a different test, at least as difficult to prove, must apply when the condition that is misdiagnosed is symptomatic. That test, I submit, must require proof that the pain being experienced indicates a deterioration of the condition beyond where it was when the diagnosis was made.

If all that is required to satisfy the definition of "injury" is the continuation of the pain already being experienced before the misdiagnosis is made, or where aggravation or deterioration of the misdiagnosed condition is required and the continued pain is sufficient evidence of that aggravated or deteriorated condition, § 6-202 (8) is mere surplusage. Such an interpretation renders the venue statute a nullity because an action for misdiagnosis of a syptomatic condition would necessarily, and always, have to be brought where the misdiagnosis occurred.

When Darwin presented at the hospital, he already was exhibiting symptoms of the condition it is alleged that the

respondents misdiagnosed: he was experiencing pain and complaining of a headache. The question thus was, when he was discharged, had the condition progressed beyond the point at which it was when he presented? In other words, had the condition progressed to the prescribed extent so as to constitute an injury? Certainly, the presence of pain, the continuation of what already was being experienced, cannot be enough; where treatment has not been given, and, indeed, could not have been, because the nature of the condition was not diagnosed, the mere continuation of the experiencing of pain may or may not suffice to establish injury for purposes of the venue statute.

At best, the interrogatory answer on which the Court of Special Appeals placed, and the majority places, dispositive significance was, at best, conclusory; it simply was not sufficient to establish the extent of the deterioration in Darwin's condition and, in particular, when his condition reached the point at which such deterioration became an injury. It must be kept in mind that the interrogatory was not part of a record on summary judgment nor, at the time it was given, accepted as true or uncontradicted. Certainly, the answer was not such as to require the entry of summary judgment in the petitioners' favor. Indeed, the respondents did not so contend. In fact, and rightly so, more satisfactory proof was required. *Compare Jones v. Speed, supra.*

In *Jones v. Speed*, the plaintiff visited the defendant physician sixteen times, on each occasion complaining of severe headaches, the cause of which was discovered some five months after the plaintiff's last visit when the plaintiff suffered a seizure. The defendant failed to discover on any of the visits that the plaintiff's headaches were caused by a brain tumor, which a brain scan would have revealed. This Court concluded that although negligence producing an 'injury' occurred on the first visit as well as each of the fifteen subsequent visits, the defendant's failure to detect "'a progressively worsening and

changing medical condition'" proximately caused "'[e]ach severe and prolonged headache, and the final seizure ....'" 320 Md. at 256, 577 A.2d at 67. Discussing *Jones*, we pointed out in *Rivera* that the uncontradicted evidence on summary judgment[11] in *Jones* was that an "undiagnosed cancer was progressing and worsening during the period following the misdiagnosis, even if the cancer was asymptomatic." *See* 347 Md. 223, 699 A.2d at 1202.

In this case, rather than decide the merits of whether and where Darwin suffered injury and, therefore, the proper venue for his action, the Court of Special Appeals should have determined only whether the Circuit Court for Baltimore City applied the proper test in reaching its venue decision. Accordingly, I believe that a new trial is required to be conducted in the proper venue, for the determination of which this case should be remanded.[12]

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11 The plaintiff's expert's affidavit stated:

"It is my opinion that if a CT Scan had been performed by Mrs. Jones' doctor, Dr. Speed, at any time during their eight year professional relationship, that the brain tumor would certainly have been detected.

Each time that Mrs. Jones saw Dr. Speed, a separate medical injury occurred, because of the failure of Dr. Speed, at each of these visits, to detect a progressively worsening and changing medical condition.

Each severe and prolonged headache, and the final seizure, grew out of a series of medical injuries directly caused by the carelessness of the treatment administered by Dr. Speed."

Jones v. Speed, 320 Md. at 256, 577 A.2d at 67.

12 Doctor Mody and NAHA were granted judgment at the conclusion of the petitioners' case, the court concluding that there was insufficient evidence of their culpability to go to the jury. It is well settled that, unless there is prejudicial error, no new trial will be ordered. As to Dr. Mody and NAHA, there was no prejudice.

III.

Although the importance of the trial right, whether by jury or the court, is well established in both the Maryland Constitution, *see* art. 24, Maryland Declaration of Rights;[13] *see also* art. 19, Maryland Declaration of Rights ("That every man, for any injury done to him in his person or property, ought to have remedy by the course of the Law of the Land, and ought to have justice and right, freely without sale, fully without any denial, and speedily without delay, according to the Law of the Land."), and the Federal Constitution, *see* U.S. Const. amend. XIV,[14] as an element of the process that is due a litigant, this Court has not been called upon to address the precise issue presented in this case. We have, however, considered whether the right of a civil party litigant to attend his or her trial is absolute and concluded that it is not. *Casson v. Casson*, 226 Md. 575, 576,174 A.2d 581, 582 (1961); *Gorman v. Sabo*, 210 Md. 155, 167, 122 A.2d 475, 481 (1956).

Our conclusion is consistent with the decisions rendered by the majority of courts that have considered the issue. *See Rubert-Torres v. Hospital San Pablo, Inc.*, 205 F.3d 472, 478 (1st Cir. 2000); *Levi v. District of Columbia*, 697 A.2d 1201, 1205 (D.C. App. 1997); *Helminski v. Ayerst Laboratories*, 766 F.2d 208, 217 (6th Cir. 1985); *In re Richardson-Merrell, Inc.*

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[13] That section provides:

> "That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land."

[14] Amendment XIV, Section 1 to the United States Constitution, declares, in relevant part,

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Bendectin Products, 624 F. Supp. 1212, 1224 (S.D. Ohio 1985); *Ryfeul v. Ryfeul*, 650 P.2d 369, 374 (Alaska 1982); *Florida Greyhound Lines, Inc. v. Jones*, 60 So.2d 396 (Fla. 1952); *Morley v. Superior Court*, 131 Ariz. 85, 638 P.2d 1331, 1334 n.1 (1981); *Whitfield v. Roth*, 10 Cal.3d 874, 112 Cal Rptr.. 540, 519 P.2d 588 (1974); *Purvis v. Inter-County Telephone & Telegraph Co.*, 203 So.2d 508, 511 (Fla. Dist. Ct. App. 1967); *Gage v. Bozarth*, 505 N.E.2d 64 (Ind. App. 1987); *Dickson v. Bober*, 269 Minn. 334, 130 N.W.2d 526, 530 (1964) ("determination of whether a plaintiff unable by reason of his injuries to contribute to or understand the trial proceedings should be permitted . . . to attend the trial must rest in the sound discretion of the trial court . . ."); *Mason v. Moore*, 226 A.2d 993, 641 N.Y.S.2d 195 (1996); *Caputo v. Joseph J. Sarcona Trucking Co.*, 204 A.D.2d 507, 611 N.Y.S. 2d 655 (1994); *Matter of Radjpaul v. Patton*, 145 A.D.2d 494, 535 N.Y.S.2d 743 (1988); *Reems v. St. Joseph's Hospital and Health Center*, 536 N.W.2d 666 (N.D. 1995); *Cary ex rel Cary v. Oneok, Inc.*, 940 P.2d 201 (Okla. 1997); *Bremner By and Through Bremner v. Charles*, 312 Or. 274, 821 P.2d 1080 (1991).

Some of these cases do not permit the requested exclusion and, so, do not spell out the circumstances under which exclusion would be upheld. Thus, they do not define, with specificity, the limits of the trial court's discretion but, rather, they simply recognize that the right to be present is not absolute, stating the general and non specific rule that "[a]bsent a voluntary waiver . . . only in the case of extreme circumstances may a party be excluded from the proceedings." *Cary ex rel Cary*, *supra*, 940 P.2d at 204. *See also Ryfeul*, *supra*, 650 P.2d at 372 (stressing the circumstances of the case as basis for holding that proceeding with a hearing to modify a divorce decree in the absence of one of the parties was error); *Florida Greyhound Lines, Inc.*, *supra*, 60 So.2d at 397 (noting the power of the court to "regulate the appearance [of a party] to prevent the opposite party from being victimized and the jury from being deceived by . . . subterfuge . . . ."); *Purvis*, *supra*,

203 So.2d at 510-11 (noting the distinction between *Florida Greyhound Lines* and *Dickson v. Bober*, *supra*, and purporting to understand the result reached in the latter); *Mason*, *supra*, 641 N.Y.S.2d at 197 (stating "absent an express waiver or unusual circumstances, a party to a civil action is entitled to be present during all stages of the trial"); *Matter of Radjpaul*, *supra*, 535 N.Y.S. 2d at 745 (same).

On the other hand, *Whitfield v. Roth*, *supra*, 112 Cal. Rptr. 540, 519 P.2d at 604 n.27, a medical malpractice case, held that limiting a minor plaintiff who was paralyzed in both legs and his right arm to a 10-minute appearance in the courtroom was not an abuse of discretion. *Cary*, *supra*, also is illustrative of this group of cases. There, a badly burned six year old boy was excluded from the courtroom by the trial court, "because he [wa]s scarred so badly [the trial judge] th[ought] it would be unfairly prejudicial." Answering the question whether a party could be excluded solely based upon a disfigurement, the Oklahoma Supreme Court opined:

> "Oklahoma has never held, nor do we so hold here, that a party's right to be present in the courtroom is absolute. We can contemplate situations in which the disruptive behavior of a party would necessitate the party's exclusion from the courtroom, and a trial may proceed after a party has voluntarily waived the right to be present. However, we find no authority for the proposition that a party may be excluded solely by reason of his disfigurement. Absent a voluntary waiver we hold that only in the case of extreme circumstances may a party be excluded from the proceedings. . . .
>
> A party's physical appearance cannot be the sole basis for exclusion from the courtroom, and does not amount to an 'extreme circumstance' permitting exclusion. We agree with the Florida Supreme Court which stated:

> 'One who institutes an action is entitled to be present when it is tried. That, we think, is a right that should not be tempered by the physical condition of the litigant. It would be strange, indeed, to promulgate a rule that a plaintiff's right to appear at his own trial would depend on his personal attractiveness, or that he could be excluded from the court room if he happened to be unsightly from injuries which he was trying to prove the defendant negligently caused.'"

Cary, 940 P.2d at 204 (quoting *Florida Greyhound Lines, supra*, 60 So.2d at 396) (internal citations omitted).

Most of the cases holding that party presence is not absolute recognize that "under limited circumstances a party's involuntary exclusion might be justified," *i.e.*, where the mere presence of that party would prejudice the other party with regard to liability and that party's presence, because the party is unable to understand, participate in or contribute to, the proceedings, would not aid the fair administration of justice. *See, e.g., Helminski*, 766 F.2d at 217. They hold, however, that "absent disruptive behavior, involuntary exclusion of a party who is able to comprehend the proceedings and aid counsel would constitute a denial of due process since exclusion of such a party would deny him the right to obtain a fair trial." *Id.* *See also Rubert-Torres, supra*, 205 F.3d at 478; *Reems, supra*, 536 N.W.2d at 669; *Caputo, supra*, 611 N.Y.S. 2d at 656; *Bremner, supra*, 821 P.2d at 1085; *In re Richardson-Merrell, Inc., supra*, 624 F. Supp. at 1224; *Dickson, supra*, 130 N.W.2d at 530; *Gage, supra*, 505 N.E.2d at 67.

Helminski is representative. It involved an injury that resulted in the plaintiff, who was an autistic child with an extremely low IQ and unable to speak, needing daily, twenty-four hour care. The defendants moved to exclude the plaintiff from the liability phase of the trial, arguing that his appearance before the jury would be prejudicial to their case. *See* 766 F.2d

at 212. The district court agreed. *Id.* On appeal, the United States Court of Appeals for the Sixth Circuit affirmed. Although the basis of the ruling was "harmless error," the court addressed the merits of the case, developing a two step analysis to determine whether a party's involuntary exclusion from the liability phase of trial violates due process:

> "In short, the defendant who seeks to exclude a handicapped plaintiff must establish at a hearing that the plaintiff's presence would prevent or substantially impair the jury's performance of its fact-finding task. The requisite showing of prejudice cannot be satisfied simply by establishing that a plaintiff has a physical or mental injury; the party seeking exclusion must establish that the party's appearance or conduct is likely to prevent the jury from performing its duty. We reiterate that a party's ability to comprehend the proceedings or assist counsel is not the relevant inquiry at this juncture -- the issue is whether the party's presence will unfairly prejudice the proceedings in his favor.
>
> Should the district court determine that the party's mere presence would be prejudicial, the court must next consider whether the party can understand the proceedings and aid counsel. If the trial court concludes that the party can comprehend the proceedings and assist counsel in any meaningful way, the party cannot be involuntarily excluded regardless of prejudicial impact; in such a case, cautionary instructions will protect the interests of the defendant in a fair trial. Exclusion of a party who is able to comprehend the proceedings and aid his attorney would infringe upon the 'fundamental standards of fairness which every litigant before a federal court has a right to expect,' *Drayton v. Jiffee Chemical Corp.*, 591 F.2d 352, 361 (6th Cir. 1978), and hence, would constitute a deprivation of due

process which could be remedied only by granting a new trial."

Id. at 218.

The premise on which the court proceeded is that "[a]n essential component of a fair trial is 'a jury capable and willing to decide the case solely on the evidence before it,'" that the court has the responsibility to "safeguard the jury's ability to decide the case based upon the evidence presented rather than on emotional factors." *Id.* at 217. The court recognized, however, that there is a difference between juror sympathy that presents the potential for juror prejudice and juror sympathy that actually results in juror prejudice, "juror sympathy alone [being] insufficient to establish juror prejudice." *Id.* The court also noted that, "[g]enerally, the jury will follow the court's instructions and fulfill its promise to decide the case solely on the facts." *Id.* Thus, only when the mere presence of a party would render the jury unable to arrive at an unbiased judgment concerning liability, the court made clear, would the rule it enunciated be invoked. *Id.* Further, the court noted that the burden of persuasion on the issue rests with the defendant who asserts prejudice, stating: "To allow involuntary exclusion on any other basis would permit the presumption that an injured person's presence alone will always deter the jury from its fact-finding mission. Such a presumption would only institutionalize a reaction based solely upon appearance." *Id.*

Although the minority position, there also are cases holding that a plaintiff has an absolute right to be present at his or her civil trial.[15] *See, e.g., Rozbicki v. Huybrechts*, 218 Conn.

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[15] *Gallavan v. Hoffner*, 390 P.2d 817, 818 (Colo. 1964) has been cited for this proposition, however, it actually holds that "a litigant has the right, to be present at trial to assist his counsel in the trial, and his necessary absence is a good reason for a continuance."

386, 589 A.2d 363, 365 (1991)[16] (recognizing that "a party's constitutional right to a civil jury trial encompasses the right to be present in the court during all phases of the trial, including proceedings prior to the trial on the merits of the case.");[17] *Odum v. Corn Products Refining Co.*, 173 Ill. App. 348, 352 (1912) ("We know of no law that prevents interested persons from being present at the hearing of their case, even though their unfortunate condition was such as to enlist the sympathy of the jury.");[18] *Ziegler v Funkhouser*, 42 Ind. App. 428, 85 N.E. 984, 986 (1908) (every litigant has a right to be present in person and be heard by counsel on the trial of his case);[19] *McIntosh v. McIntosh*, 79 Mich. 198, 203, 44 N.W. 592 (1890) (acknowledging that the exclusion of witnesses generally is

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[16] Although a recent Connecticut trial court decision, *Wozniak v. New Britain General Hospital*, 2001 WL 717497 at *2, 2001 Conn. Super. Lexis 1547 at *6 (June 1, 2001), opines that "*Rozbicki* does not state that a party has an absolute right to attend trial," that opinion cannot overrule *Rozbicki*, which is a Connecticut Supreme Court case.

[17] Addressing the issue in that case, the right of a party to a civil action to be present during jury voir dire, the Court stated: "We have assumed that a plaintiff in a personal injury action has a personal right to be present during voir dire, so long as he does not 'disturb the orderly business of the court."

[18] Rejecting the defense argument that the presence of a widowed plaintiff and her children would have a tendency to arouse sympathy in the jury that would induce it, on that basis, to find for her, the court stated:

> "It may be true that the presence of the widow and these children would tend to enlist the sympathy of the jury in their behalf, but the widow and children are interested parties in the result of this suit; whatever judgment is obtained belongs to them and we know of no law that prevents interested persons from being present at the hearing of their case, even though their unfortunate condition was such as to enlist the sympathy of the jury, and we have not been referred by counsel to any case that, as we think, announces a different principle."

[19] *Compare Gage v. Bozarth*, 505 N.E.2d 64 (Ind. App. 1987). Although the intermediate appellate court seems to have come out on both sides of the issue, the Supreme Court of Indiana has not spoken on this issue.

within the discretion of the court, but pointing out that "[t]here is no rule . . . by which the court is authorized to exclude[ ] a party to the controversy.");[20] *Leonard's of Plainfield, Inc. v. Dybas*, 130 N.J.L. 135, 31 A.2d 496, 497 (1943) (determining that the "right of the parties to the cause to be present in person and by counsel at all stages of the trial, except the deliberations of the jury, is basic to due process."); *Carlisle v. County of Nassau*, 64 A.D.2d 15, 408 N.Y.S.2d 114, 116 (1978) ("the fundamental constitutional right of a person to have a jury trial in certain civil cases includes therein the ancillary right to be present at all stages of such a trial, except deliberations of the jury"); *Raper v. Berrier*, 246 N.C. 193, 97 S.E.2d 782, 784 (1957) (parties are entitled to be present at all stages of a civil trial).

From the foregoing lines of cases, several things are clear. The right to be present may be waived. The involuntary exclusion of a party from that party's trial or part thereof is disfavored. Those courts that permit involuntary exclusion, in which the right of a party to be present is held not absolute, agree on this point. Those that are most liberal in involuntarily excluding a party acknowledge that such exclusion may be justified only "under limited circumstances," *Helminski*, 766 F.2d at 217, while those least liberal phrase the test in terms of "extreme," *Cary ex rel Cary*, *supra*, 940 P.2d at 204, or "unusual," *Mason*, *supra*, 641 N.Y.S.2d at 197, circumstances.

In any event, the physical appearance or condition of a party may not alone justify exclusion. To justify the involuntary exclusion of a party, there must be shown prejudice to the opposing party to the extent that the opposing party will not be able to obtain a fair trial. Further, the party seeking exclusion bears the burden of showing that only through

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[20] More recently, the Michigan Court of Appeals, in *Florence v. Wm. Moors Concrete Products, Inc.*, 35 Mich. App. 613, 193 N.W.2d 72 (1971), agreeing with the plaintiffs' contention that they had "an absolute right to be present at all stages of the proceedings regardless of whether criminal or civil in nature," ruled that it was reversible error to require the plaintiffs in a wrongful death suit to leave the courtroom while the judge reread the charge to the jury.

exclusion can a fair trial be obtained. *Helminski*, 766 F.2d at 217.

This Court has twice addressed the question of proceeding with a trial in the absence of a party. On each occasion, the context was the denial of a request for continuance. In both cases, we upheld the trial court's exercise of discretion. In neither case was there a motion by one party to exclude the other. In *Gorman*, having observed that the defendants did not argue, either in brief or at oral argument, that their case would be harmed by the refusal to allow the continuance, in short, that "[n]o actual prejudice was claimed, much less shown," 210 Md. at 167, 122 A.2d 481, the Court stated: "The right of a party to a cause to be present throughout the trial is not an absolute right in a civil case and in the discretion of the court, with due regard to the circumstances as to prejudice, the case may be tried or finished when a party, including a defendant, is absent." *Id.*

In *Casson*, it was the plaintiff who was absent. We described the circumstances surrounding the continuance request as follows:

> "On the first day of trial, February 20, 1961, she testified fully, in both direct and cross examination. That night she had a heart attack, and her counsel sought a continuance. Upon being informed that other witnesses were not available, because they had been told by the plaintiffs not to appear, the trial court stated that the case would be carried over until February 23rd, but that no further continuance would be granted. On February 23rd, counsel requested a further continuance on the ground that Mrs. Casson was unable to appear; that he had summoned other witnesses, but learned that Mrs. Casson had told them to disregard the summons; that Mr. Casson was present but declined to testify unless his wife was present."

226 Md. at 576, 174 A.2d at 582. We relied on *Gorman* in affirming the trial court's denial of the continuance request, noting both that the plaintiff had no absolute right to be present and that there was no showing of prejudicial error. *Id.* at 576-

77, 174 A.2d at 582. Neither *Gorman* nor *Casson* is directly apposite to the question this case presents. Far from being involuntary exclusion cases, both fall closer to the "waiver" side of the equation.

Safeway Stores, Inc. v. Watson, 317 Md. 178, 562 A.2d 1242 (1989), however, sheds some light on where Maryland stands on the issue of the involuntary exclusion of parties from their trials. In that case, a worker's compensation dispute, Safeway, a corporation, sought to designate as its representative a claims adjuster employed by a company that Safeway retained to adjust its worker's compensation claims. The claims adjuster, who was slated to testify for Safeway, also had investigated the claim. *Id.* at 179, 563 A.2d at 1243. Ruling that the claims adjuster was "not entitled to the same privileges that a representative of a defendant would be," the trial court excluded him from the courtroom after voir dire, except for when he testified. *Id.* at 179-80, 562 A.2d at 1243.

At issue in *Safeway Stores* was the interpretation of Maryland Rule 2-513, which provided:

> "On motion of any party made before testimony begins the court shall order that witnesses other than parties be excluded from the courtroom before testifying, and it may do so on its own initiative or on motion of any party made after testimony begins. The court may continue the exclusion of a witness following the testimony of that witness if a party indicates that the witness may be recalled to give further testimony. A party that is not a natural person may designate a representative to remain in the courtroom, even though the representative may be a witness. An expert witness who is to render an opinion based on testimony given at the trial shall be permitted to remain during that testimony."

317 Md. at 179, 563 A.2d at 1243. We saw the issue in turn resolving into two questions: what, if any, nexus was required between the representative designated and the "party that is not a natural person," and further, whether the trial court had discretion to disapprove the designation that party made? After reviewing the history of the Rule, we concluded, "The language

and history of Rule 2-513 make it clear that a party that is not a natural person has very broad latitude in the selection of a representative when witnesses are excluded, and the exercise of this right is not subject to the discretion of the trial judge." *Id.* at 183, 562 A.2d at 1245. Relevant to this latter point, we further explained that "the trial judge has inherent authority to remove parties, witnesses, and spectators under certain circumstances, where that action is necessary to preserve decorum or to continue the orderly proceedings of the court, and a designated representative of a party is not exempt from the operation of that authority." 317 Md. at 184 n.4, 562 A.2d at 1245 n.4. Thus, we determined that the trial court erred in excluding Safeway's designated representative from the courtroom.

The Court next considered whether the error was reversible. The claimant argued that the burden was on Safeway to prove both the error and the prejudice emanating from it. Safeway, on the other hand, acknowledging the accuracy of the claimant's statement of the general rule, argued that where a party is denied an important right that is very likely prejudicial to it and actual prejudice is difficult to prove, the burden should be on the "party advantaged by the erroneous disqualification to prove that the disqualification did not influence the outcome of the litigation." 317 Md. at 184, 562 A.2d at 1245. We concluded that it is appropriate to presume prejudice from the wrongful exclusion of a party, or its representative, from a trial. *Id.* We went on to opine:

> "Experienced trial attorneys and judges understand the importance of 'humanizing' a corporate defendant in a jury trial. Moreover, a party is entitled to be present to have a firsthand view of the proceedings for purposes of evaluating the constantly changing prospects or exigencies for settlement, and to participate in tactical decisions that must be made, sometimes quickly, in the course of a trial. Finally, the attorney for Safeway was deprived of the presence at his side of the principal investigator in the case. Whether we consider these facts as mounting up to the necessary proof of prejudice by Safeway, or simply consider them in determining that a presumption of

> prejudice is appropriate in this case, the result is the same. The claimant has not overcome the proof or presumption, and the result must be a new trial."

Id. at 184, 562 A.2d 1246.

Therefore, albeit by rules action, Maryland courts have no discretion to interfere with the choice of representatives made by parties who are non-natural persons. Indeed, they may exclude such party designated representatives only "to preserve decorum or to continue the orderly proceedings of the court." Thus, their ability to affect the trial presence of such parties is quite limited.

The *Safeway Stores* analysis informs the resolution of the question this case presents because it demonstrates this Court's reluctance to permit the trial courts to interfere with a civil party's decision as to whether to attend trial. Certainly, if a trial court may not exclude the representative designated by a party that is a non natural person, even one that will testify at the trial when there is a sequestration order in effect, by parity of reasoning, a similar restriction must exist with respect to the court's power to exclude parties who are natural persons. Permitting the court to involuntarily exclude a party who is a natural person on the basis of that party's appearance and mental condition is to give the court more authority to exclude parties who are natural persons than it has with respect to parties that are non natural persons. Indeed, the prejudice emanating from allowing a witness, who ordinarily would be excluded by a sequestration order, to remain in the courtroom and to hear the testimony of other witnesses before testifying may be greater than that caused by a disabled party's appearance, at least with proper instruction of the jury. To be sure, part of the rationale underlying the rule permitting a non natural person to designate someone to represent it at trial is to allow that party to provide assistance to its counsel during the trial and, logically, it makes sense for the party to so use the representative. There is nothing that requires the party to designate on that basis and, indeed, under *Safeway Stores*, the court cannot inquire as to the basis for the designation, which need not even be confined to the employees of the designating party.

Applying the *Safeway Stores* analysis, I agree with the approach adopted by *Cary v. Oneok*, *supra*. In that case, as indicated, the Court rejected the proposition that a party could be excluded solely on the basis of appearance and, acknowledging a party's right voluntarily to waive presence, permitted the involuntary exclusion of a party "only in the case of extreme circumstances." 940 P.2d at 204. In *Safeway Stores*, the exception was stated in terms of preserving decorum and continuing the orderly proceedings of the court. Although stated differently, I believe the articulated exceptions are comparable. Accordingly, I would hold that, absent a voluntary waiver, a party may not be excluded from his or her trial except "to preserve decorum or to continue the orderly proceedings of the court." *Safeway Stores*, 317 Md. at 184, 562 A.2d at 1245.

I am not persuaded by *Helminski* and those cases permitting the exclusion of parties who are unable to aid counsel or understand the proceedings and whose physical appearance is determined to be prejudicial to the other party. *Helminski* recognizes a category of cases in which the mere presence of a party would prevent the jury from reaching an unbiased verdict. The decision whether a particular case falls into that category of cases is left to the discretion of the trial court. At the same time, the *Helminski* court acknowledges that juror sympathy alone is insufficient to establish juror prejudice and that jurors generally follow the court's instructions and abide by their oath to decide cases only on the facts. Where the party whose appearance is prejudicial is not mentally handicapped, or at least not so much as to render him or her unable to comprehend the proceedings or assist counsel, involuntary exclusion is not an option; the instructions to the jurors will suffice to protect the other party, "cautionary instructions will protect the interests of the defendant in a fair trial." *Id.* at 218. On the other hand, if the party, in addition to an unsightly appearance, suffers from a mental condition that prevents him or her from understanding the proceedings or assisting counsel, exclusion is required; jury instructions are deemed insufficient to protect the other party. In the one case, the jury is trusted to abide by its oath, while in the other, it is not. And the only basis for the distinction is the mental condition of the party.

Despite the *Helminski* court's protestations to the contrary, the *Helminski* court sanctions the exclusion of a party on the basis of that party's physical appearance in those cases where the party does not understand the proceedings and cannot assist counsel. I share the Oklahoma Supreme Court's concern about the drawing of such a distinction:

> "There may need to be a re-examination of those cases, including *Helminski*, which hold that a disfigured plaintiff may be excluded if he or she cannot aid the attorney or comprehend the proceedings. These cases were decided before the enactment of the Americans with Disabilities Act, a law that specifically prohibits discrimination on the basis of a physical or mental handicap. Title 42 U.S.C. § 12132 (1990). Those cases which followed this reasoning and were decided after the ADA's enactment did not address the issue."

Cary, 940 P.2d at 205 n.6 (internal footnotes omitted)[21] (citing *Kroll v. St. Charles County*, 766 F. Supp. 744 (E.D.Mo. 1991) (noting that the ADA applies to physical surroundings of a federal courthouse)); *see also Livingston v. Guice*, 68 F.3d 460 (4th Cir. 1995) (holding that a judge was not immune from liability for violating the ADA by not accommodating a physically handicapped person who needed special access to a restroom during trial).

I also am concerned with the lack of a principled basis for trusting the jury, under proper instructions, in the one case, and not trusting the jury in the other. If, in the case of a party who is able to understand the proceedings or assist counsel, but whose appearance prejudices the other party, jury instructions are sufficient to protect that party, it is difficult to see why those same instructions would not suffice in the case of a party with similar appearance, but who is unable to assist counsel or comprehend the proceedings. Under the *Helminski* analysis, because it is possible for a party to have a minimal appreciation

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[21] Continuing, the court opined that even if it were to conclude that the *Helminski* standard survived the ADA and was the preferable approach, it still would not have been satisfied in the context of the case.

of the proceedings without being able to assist counsel, it is conceivable that two persons with identical appearances, but different mental conditions, will be treated differently, *i.e.* one excluded and the other allowed to remain in the courtroom. In this case, under *Helminski*, if it were shown that Darwin had some ability to understand what was going on around him, he would not have been excludable unless he was disruptive.

Further, "a stereotypical assumption that a party's disability will prejudice the jury," *see Mason*, 641 N.Y.2d at 197, is an insufficient ground for excluding that party from the trial. Despite its recognition of the distinction to be made between juror sympathy and juror prejudice, the *Helminski* approach permits the elevation of a stereotypical assumption to grounds for involuntarily excluding a party without providing any rational basis for doing so. It is sufficient, we are instructed, that the trial court decides after viewing the party that the party's appearance will result in juror prejudice.

Finally, voir dire is the process by which prospective jurors are examined to determine whether cause exists for their disqualification. *See Boyd v. State*, 341 Md. 431, 435, 671 A.2d 33, 35 (1996). It is, moreover, the mechanism whereby the right to a fair and impartial jury is given substance. *Dingle v. State*, 361 Md. 1, 10, 759 A.2d 819, 823 (2000). A juror who would be unduly influenced by sympathy for a party to the point of not being able to abide by his or her promise to decide the case solely on the facts and in accordance with the court's instructions is not a fair and impartial juror and, thus, is subject to being stricken for cause. Although the trial judge is the focal point of the voir dire process, whether the jury is able to decide the case on the facts is not a decision to be made by the court in a vacuum. Consequently, neither the timing of the inquiry, nor the nature of the remedy, was appropriately addressed in *Helminski*. Thus, rather than the court's making inquiry into the jury's ability to be fair and impartial after the jury has been impaneled, the proper time to inquire was before the jury was impaneled and the remedy for partiality was exclusion from the jury, not exclusion of the party from the trial.

To be sure, *Helminski* quite correctly recognizes that there is a difference between juror sympathy and juror prejudice. Stated differently, the likelihood of jury sympathy is not the

equivalent of prejudice. "A juror's sympathetic feeling toward a party does not necessarily lead to the conclusion that the jury will disregard the law to reach a verdict based on sympathy alone." *Cary*, 940 P.2d at 205. This view is consistent with the Court of Special Appeals' decisions touching on the subject. *See Ford Motor Co. v. Wood*, 119 Md. App. 1, 17, 703 A.2d 1315, 1322, *cert. denied*, 349 Md. 494, 709 A.2d 139 (1998); *Fowlkes v. State*, 117 Md. App. 573, 584, 701 A.2d 862, 868 (1997), *cert. denied*, 348 Md. 523, 704 A.2d 1244 (1998). In both cases, the intermediate appellate court noted that "a jury is not expected to judge a case without sympathy." *Wood*, 119 Md. App. at 17, 703 A.2d at 1322; *Fowlkes*, 117 Md. App. at 584, 701 A.2d at 868.

In *Wood*, the question was whether a juror with lung cancer should have been stricken for cause. In *Fowlkes*, the controversy was over whether the court abused its discretion in refusing to propound a voir dire question on sympathy. In that regard, *Fowlkes*, on which *Wood* relied, observed:

> "The purpose of voir dire is to ferret out bias or prejudice conceived prior to entry into the courtroom that would prevent a juror from fairly and impartially deciding the case based on the evidence presented in the courtroom. The appellate courts of this State have rightfully presumed that a person with racial, ethnic, or gender bias cannot render such a fair and impartial verdict but, in our view, sympathy falls into a different category. The question, with respect to a specific bias, is whether the bias exists. If determined to exist, a trial judge may excuse a prospective juror even if the person purports to be able to render a fair verdict. In contrast, we expect normal people to experience sympathy, and the question in that instance is whether the person will be unduly swayed by sympathy. In other words, a jury is expected to decide a case without bias or prejudice; it is not expected to do so without sympathy but is expected to follow the court's instruction that it not be unduly swayed by it. In most cases, it would be difficult for a prospective juror to know the degree to which feelings of sympathy would be aroused until the evidence is

> presented. In every case, there are factors that may evoke feelings of sympathy."

117 Md. at 584-85, 704 A.2d at 868.

Here, Darwin Green did not voluntarily waive the right to be present at trial. Nor was he excluded "to preserve decorum or to continue the orderly proceedings of the court" or because he engaged in, or was likely to engage in, disruptive conduct. Rather, Darwin was excluded because of his appearance and because of his inability to understand the proceedings or to assist counsel. In excluding Darwin, the trial court stated:

> "The burden of persuasion is to the moving party, and they have carried that burden in this instance. The Defendant who seeks to exclude a handicapped plaintiff must establish that the presence of the plaintiff would prevent and substantially impair the jury's performance. The impairment or the prejudice must be so great that the jury instructions would not likely correct that prejudice.
>
> And having viewed the tape, the Court is convinced that any viewing of the Plaintiff in person or by a video would leave any party in a position to be emotionally struck and otherwise feeling sympathy for the Plaintiff."[22]

The court was overly sensitive that the jury would be sympathetic to the petitioner and, more to the point, without any basis for so concluding except the viewing of the video, concluded that the jury would be unduly swayed by that sympathy to the prejudice of the respondents. The record does not reflect any basis for that conclusion. Certainly, it does not appear that the jurors were voire dired on the effect that Darwin's presence in the courtroom would have or whether they could, despite any sympathetic feelings, decide the case solely on the facts and the law, as instructed. In short, there is absolutely no basis in this record for the court to conclude that

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[22] As phrased, it appears that the court determined only that the jury likely would be emotionally struck and sympathetic, rather than prejudiced in favor of the petitioners.

the jury could not "decide the case solely on the evidence before it." *Helminski*, 766 F.2d at 217.

Neither the trial court, nor the Court of Special Appeals, nor even the majority has articulated any reasons or analyses of how the plaintiff's presence would evoke more than the expected feelings of sympathy. And we have not been told how his presence in the courtroom for the limited time the petitioners wished would render the jury incapable of returning a verdict decided solely on the facts.

In conclusion, there is, as the petitioners and amicus point out, another dimension and significance to this case, namely, the message the rule the majority adopts sends to the disabled. The petitioners and amicus argue that "any party to a civil action has both a federal and state constitutional right to be present at trial" and that a "litigant's presence serves the functions of assistance to counsel, truthful fact-finding, presentation of direct evidence, assurance of fairness of proceedings and to assure the public's perception of fairness of the proceedings. Exclusion, on the other hand, causes harm to the party, society and our court system as a whole." Furthermore, they continue, "[i]n the case of the disabled, party exclusion broadcasts the message that disabled litigants do not have the same rights as the rest of us [by implying] a lower legal status for the disabled, which keeps alive unnecessary and unwarranted stereotypes and prejudices against the disabled." Noting the promise of the enactment of the Americans With Disabilities Act (the ADA), 42 U.S.C. §§ 12101-12213 (1994), the guarantee to the disabled of equal opportunity, full participation and equal access and, thus, the recognition that "disability is a natural part of the human experience," 42 U.S.C. § 6000 (a) (2) (1994), the petitioners and amicus lament that "exclusion of a party from trial based on a disability is equivalent to discrimination" and, consequently, submit that "a trial court does not have discretion to remove a litigant's basic rights, irrespective of the litigant's physical and mental limitations, unless an overriding objective, necessary and

compelling, and narrowly tailored to meet the court's objective exists." I do not believe, as I have discussed, that this Court's holding responds to an overriding, necessary, and compelling objective consistent with the Court's mandate and purpose.

I would hold that the trial court erred in excluding Darwin Green from the liability phase of his trial.

Judge Rodowsky has authorized me to state that he concurs with the views expressed in Part III of this dissenting opinion.

APPENDIX B

REPORTED
IN THE COURT OF APPEALS OF MARYLAND

No. 538

September Term, 1998

DARWIN GREEN, A MINOR, ETC. ET AL.

v.

NORTH ARUNDEL HOSPITAL
ASSOCIATION, INC., ET AL.

Wenner,
Salmon
Getty, James S.
(Ret., Specially Assigned),
JJ.

Opinion by Salmon, J.

Filed: May 26, 1999

Darwin Green (Darwin), a disabled minor child, through his parents and next friends, Teresa Johnson and Charles Johnson (appellants), instituted a medical malpractice action against North Arundel Hospital Association, Inc. (NAH); Richard T. Fields, M.D.; Stewart P. Axelbaum, M.D.; and Harshad R. Mody, M.D. (appellees).[1] Appellants claimed that

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[1] Appellants also named the University of Maryland Medical System, University Hospital, as a defendant in the suit. Darwin's parents subsequently signed a joint tortfeasor release against the University of Maryland in exchange for a payment of $1,489,000.

appellees breached the applicable standard of care by failing to diagnose an alleged shunt malfunction in Darwin on August 18, 1988, and that a proper diagnosis would have prevented the child's subsequent injuries that have left him in a chronic vegetative state.

Appellants filed their original complaint in the Circuit Court for Baltimore City and named only NAH and Dr. Fields as defendants. Dr. Fields resides and carries on business solely in Anne Arundel County; NAH conducts business solely in Anne Arundel County. On March 20, 1992, Baltimore City Circuit Court Judge Richard T. Rombro ruled that appellants had filed their suit in the wrong venue and transferred the action to the Circuit Court for Anne Arundel County.

The Anne Arundel County Circuit Court set a trial date for June 1994. On May 17, 1994, appellants moved to stay the Anne Arundel County proceedings because they wanted to add two new defendants to the case — Drs. Mody and Axelbaum. As required by title 3, subtitle 2A, of the Courts and Judicial Proceedings Article of the Maryland Code (1998 Repl. Vol & Supp. 1998), appellants initially filed their claims against Drs. Mody and Axelbaum in the Health Claims Arbitration Office on May 20, 1994.[2] After the parties agreed to waive arbitration in December 1995, the arbitration panel chairman signed a transfer order on February 20, 1996, allowing appellants to proceed with their case against Drs. Mody and Axelbaum in circuit court.

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[2] Title 3, subtitle 2A, of the Courts and Judicial Proceedings Article of the Maryland Code (1998 Repl. Vol. & Supp. 1998) requires certain medical malpractice claims to be submitted to the Health Claims Arbitration Office for an initial ascertainment of liability and damages before the case can proceed in circuit court. *See Attorney Gen. v. Johnson*, 282 Md. 274, 275 (1978), *overruled in part, Newell v. Richards*, 323 Md. 717, 594 A.2d 1152 (1991).

Rather than moving to lift the stay in the Anne Arundel County action by adding Drs. Mody and Axelbaum to that pending case, appellants filed a new complaint in Baltimore City Circuit Court. Appellants' basis for filing in Baltimore City was that Dr. Mody regularly conducted business and maintained his medical office there. In the Baltimore City complaint, appellants not only named Drs. Mody and Axelbaum as defendants, but they also set forth claims against NAH and Dr. Fields — the same claims already pending in the Circuit Court for Anne Arundel County. On June 3, 1996, Baltimore City Circuit Court Judge David B. Mitchell granted appellees' motion to dismiss and imposed sanctions against appellants.[3]

Meanwhile, on February 22, 1996, appellants made a motion in the Anne Arundel County Circuit Court to transfer that pending action back to Baltimore City. On August 2, 1996, Circuit Court Judge Lawrence H. Rushworth held a hearing on the motion. At the time of that hearing, neither Dr. Mody nor Dr. Axelbaum had been added to the Anne Arundel County action. Judge Rushworth denied the motion to transfer at the conclusion of the August 2nd hearing.

On August 9, 1996, appellants amended their original complaint by naming Drs. Mody and Axelbaum as defendants in the Anne Arundel County action. Dr. Mody was served with process on August 19, 1996. The record is unclear as to when Dr. Axelbaum was served with process, but he filed an answer to the amended complaint on September 17, 1996; Dr. Mody filed his answer two days later. At no time after August 9, 1996, did appellants renew their motion to transfer the case back to Baltimore City.

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[3] No appeal was filed from Judge Mitchell's dismissal of the Baltimore City action.

On October 30, 1996, Judge Rushworth bifurcated the case on the issues of liability and damages. Subsequently, the trial judge held a hearing on appellees' motion in limine to exclude Darwin from the courtroom during the liability portion of the trial. After hearing arguments and watching a videotape of a day in Darwin's life,[4] Judge Rushworth granted the motion, finding that Darwin did not have the ability to communicate with his attorneys, nurses, or parents; that he would be unable to provide any assistance to his attorneys in preparing his case; that he would be unable to understand or comprehend the proceedings; and that his presence served no purpose other than to prejudice the jurors against the defendants.

Trial commenced on October 7, 1997. At the conclusion of plaintiffs' case, on October 17, 1997, Judge Rushworth granted NAH's and Mody's motions for judgment. The jury returned a verdict in favor of Drs. Fields and Axelbaum on October 21, 1997, having concluded that neither doctor "departed from accepted standards of care in the treatment of Darwin Green."

Appellants filed this timely appeal and present four questions for our review:

1. Did . . . the Circuit Court for Baltimore City err as a matter of law in transferring [a]ppellants' action to Anne Arundel County . . . ?

2. Did . . . the Circuit [C]ourt for Anne Arundel County err in denying [a]ppellants' motion to transfer [their] action back to the Circuit Court

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[4] After watching the videotape, the court observed that Darwin was bound to a wheelchair, required twenty-four hour medical attention from nurses, breathed through a hole in his neck, and had to be fed via a feeding tube approximately every two hours.

for Baltimore City once Dr. Mody was added to the action?

3. Did the trial court err as a matter of law in barring the [p]laintiff, Darwin Green[,] from attending his own trial as a result of his physical and mental disability, in that such exclusion violated the Americans With Disabilities Act, as well as fundamental notions of equal access to justice?

4. Did the trial court err in allowing [a]ppellees to present a theory of their case that is against Maryland case law as stated in *Mehlman v. Powell*?

We answer all of the questions in the negative and affirm.

FACTS

Darwin Green was born on February 12, 1977, with a medical condition called hydrocephalus. Hydrocephalus causes increased pressure on the brain due to an excessive accumulation of fluid. When Darwin was nine days old, doctors placed a shunt in the right ventricle of his brain that drained the extra fluid to another part of his body in order to prevent the build-up of intracranial pressure.

In 1981, when he was approximately four-and-a-half years old, Darwin complained of headaches and vomiting. Doctors determined that Darwin's shunt was not functioning properly and performed surgery to correct the problem. For the next several years, Darwin experienced no problems with his shunt.

On the morning of August 17, 1988, Darwin was with his father when he began complaining that he had a headache. Darwin's father gave him Tylenol and later testified that it was not unusual for Darwin to have headaches and that Tylenol

normally cured the problem. On this day, however, the Tylenol did not work, and Darwin continued to complain of a headache. Later that day, Darwin felt nauseous, began vomiting, and refused to eat. His father continued to give him Tylenol, but Darwin's condition did not improve.

The next morning, August 18, 1988, Darwin was still complaining that he had a headache. In addition, Darwin appeared drowsy and was still refusing to eat. Darwin's father gave him another dose of Tylenol but this again failed to relieve the child's symptoms. At this point, Darwin's father became very concerned and decided to take his son to the emergency room at nearby North Arundel Hospital, located in Anne Arundel County.

Darwin and his father arrived at the hospital at 11:05 a.m. Dr. Fields, the on-call physician in the emergency room, examined Darwin at 1:00 p.m. At that time, Darwin was complaining of a severe headache. Dr. Fields ordered several laboratory tests, including an emergency CT scan. Darwin was also given Vicodin, a prescription pain killer.

Darwin's CT scan was reviewed by Dr. Axelbaum, a radiologist at NAH. Dr. Axelbaum noted the presence of shunts in Darwin's brain as well as a number of other abnormalities, but he interpreted these results as all old changes. Dr. David Buchholz, appellants' medical expert, later opined at trial that Dr. Axelbaum breached the standard of care when he reported that the changes were all old while failing to report to Dr. Fields that there was a possibility that the results could represent new change or a blocked shunt.

Dr. Fields contacted Dr. Mody, the neurologist on-call at the hospital. Dr. Mody advised that Darwin could be released once his headache was relieved. It is unclear when Dr. Axelbaum placed his written findings in Darwin's emergency room ("ER") chart. Dr. Buchholz later testified that if Dr.

Axelbaum's findings were not in the ER chart when Dr. Fields spoke with Dr. Mody, then neither Dr. Fields nor Dr. Mody breached the standard of care. If Dr. Axelbaum's findings were in the chart and Dr. Fields read it to Dr. Mody, then Dr. Fields also complied with the standard of care, according to Dr. Buchholz. Dr. Buchholz said, however, that if Dr. Axelbaum's notations were on the chart and Dr. Fields failed to read them to Dr. Mody in their entirety, then Dr. Fields would have breached the standard of care. Dr. Buchholz could not say which of these three scenarios actually occurred.

At 2:45 p.m., Darwin's headache was gone, and he was able to tolerate fluids. Dr. Fields consulted with Dr. Lee, Darwin's primary care pediatrician, who informed Dr. Fields that he would see Darwin in his office for a follow-up the next day. Dr. Fields's final diagnosis was a "vascular headache." He released Darwin from the hospital at 3:05 p.m. with instructions to follow up with Dr. Lee the next day. Darwin then left the hospital and went to his father's home, located in Anne Arundel County.

After his release from NAH, Darwin continued to complain of a headache at his father's home. That evening, his father gave him another Vicodin as prescribed by Dr. Fields. The next morning, August 19, 1988, Darwin was still complaining of a headache. His father took Darwin to Dr. Lee's office in Anne Arundel County for his follow-up appointment. Dr. Lee examined Darwin and noted that he had a headache, appeared drowsy, and had a staggering gait. Dr. Lee contacted Darwin's neurosurgeon, who referred Darwin to the University of Maryland Hospital, located in Baltimore City.

Dr. Buchholz was later to testify that Darwin's condition at Dr. Lee's office was "worse" than it was the day before at NAH and that the worsening of his condition was related to

increasing intracranial pressure caused by his still undiagnosed shunt malfunction.

Darwin and his father arrived at the University Hospital at 3:55 p.m. on August 19, 1988. The University Hospital ER records note that Darwin was weak, drowsy, and lethargic, that he walked well the day before but "today can hardly walk by himself", and that his headache was "worse today." Darwin's shunt was tapped[3] in the emergency room and a CT scan was performed. The shunt tap revealed that Darwin had increased intracranial pressure. From this information, emergency room doctors correctly diagnosed Darwin as having a probable shunt malfunction, and at 11:05 p.m., Darwin was admitted to the neurosurgery service of the University Hospital. Corrective surgery was not performed immediately, however, and the next day, August 20, 1988, Darwin experienced a cardiac arrest as a result of his shunt blockage. Doctors were able to revive and stabilize him, but the cardiac arrest caused extensive and irreversible damage to Darwin's brain. This damage has left Darwin in a permanent vegetative state.

Dr. Buchholz's expert opinion was that, given Darwin's medical history and the symptoms that he was exhibiting at NAH, the doctors should have performed a shunt tap on Darwin on August 18, 1988. According to Dr. Buchholz, if a shunt tap had been performed at NAH, it would have revealed that Darwin had increased intracranial pressure at that time. This information would have led the doctors to the proper diagnosis that Darwin's symptoms were caused by shunt malfunction. Dr. Buchholz opined that once a correct diagnosis had been made, if Darwin had been properly managed from that

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[3] A shunt tap is a diagnostic test that allows doctors to determine if a shunt is working properly.

point on and received a shunt revision,[6] then his subsequent cardiac arrest on August 20, 1988, could have been avoided.

In addition, Dr. Buchholz testified that, between the time of Darwin's discharge from NAH and his arrival at the University of Maryland Hospital in Baltimore City, Darwin had increased symptoms from his intracranial pressure, but his injuries were not irreversible at that point. According to Dr. Buchholz, if a shunt revision had been done at University Hospital on August 19, 1988, or during the morning of August 20, 1988, Darwin would have avoided his cardiac arrest and would not have suffered any permanent injury. Dr. Buchholz admitted, however, that if Darwin had been referred to the University of Maryland Hospital by NAH on August 18, 1988, there was no evidence that his course of treatment at the University of Maryland Hospital would have been any different, other than that his treatment would have started twenty-four hours earlier.[7]

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[6] A shunt revision is a procedure that repairs or replaces a malfunctioning shunt.

[7] Dr. Buchholz's testimony on this point was as follows:

Q. Now, is there any indication or any evidence that you have, Dr. Buchholz, that had Darwin been referred to the University of Maryland Hospital by North Arundel Hospital on August 18, 1988, the decision making at [the] University [of Maryland] would have been different?

A. I have no specific evidence to point to. Obviously, it would have been 24 or 25 hours earlier, but I can't point to anything that's documented in the records that indicates that the course would have been different.

ANALYSIS

Issue 1

A. *"Where the Cause of Action Arose"*

In December 1991, appellants filed their initial complaint in the Circuit Court for Baltimore City against NAH and Dr. Fields. Defendants immediately challenged venue. At a March 20, 1992, hearing, Judge Rombro found that both NAH and Dr. Fields were residents of Anne Arundel County, that they both maintained offices and engaged in business solely in Anne Arundel County, and that appellants' cause of action arose in Anne Arundel County. Based on these findings, he ruled that Baltimore City was an improper venue for the suit and transferred the case to Anne Arundel County. On appeal, appellants claim that Judge Rombro erred in this ruling.

Section 6-201 of the Courts and Judicial Proceedings Article of the Maryland Code (1998 Repl. Vol.) (hereinafter "CJ") provides, in pertinent part:

> (a) *Civil Actions.* — Subject to the provisions of §§ 6-202 and 6-203 and unless otherwise provided by law, a civil action shall be brought in a county where the defendant resides, carries on a regular business, is employed, or habitually engages in a vocation. . . .
>
> (b) *Multiple Defendants.* — If there is more than one defendant, and there is no single venue applicable to all defendants, under subsection (a), all may be sued in a county in which any one of them could be sued, or in the county where the cause of action arose.

CJ § 6-202 reads, so far as here material:

> In addition to the venue provided in § 6-201 or § 6-203, the following actions may be brought in the indicated county:

* * *

(8) Tort action based on negligence — *Where the cause of action arose*;

(Emphasis added.)

All parties agree with Judge Rombro's finding that, at the time the complaint was filed in Baltimore City, both NAH and Dr. Fields were Anne Arundel County residents who maintained their offices and conducted their business solely in that County. As such, neither party disputes that Anne Arundel County was the only proper venue under CJ § 6-201 because it provided "a single venue applicable to all defendants." Nevertheless, appellants note that CJ § 6-202(8) provides an alternative venue in negligence actions, allowing plaintiffs to bring suit in the county where the cause of action arose. *See Wilde v. Swanson*, 314 Md. 80, 92, 548 A.2d 837 (1988) (holding that when multiple venues are proper under both CJ § 6-201 and CJ § 6-202, the plaintiff can choose to proceed under either section — "Neither section enjoys a priority over the other"). Appellants maintain that, under CJ § 6-202(8), venue was proper in Baltimore City because their cause of action arose there.

Whether the court was right in transferring the case to Anne Arundel County depends, in part, upon the meaning of the phrase "where the cause of action arose." Maryland appellate courts have not had occasion to interpret this phrase in the context of our venue statutes, but prior decisions have interpreted similar language contained in section 11-108(b) of the Courts and Judicial Proceedings Article of the Maryland Code (1998 Repl. Vol.) (hereinafter CJ § 11-108(b)). Section 11-108(b) states:

Limitation on amount of damages established. — (1) In any action for damages for personal injury *in which*

> *the cause of action arises* on or after July 1, 1986, an award for noneconomic damages may not exceed $350,000.

(Emphasis added.)

In *Owens-Illinois, Inc. v. Armstrong*, 326 Md. 107, 604 A.2d 47 (1992), the Court of Appeals held that, with respect to CJ § 11-108(b), a cause of action "arises" when facts exist to support each element of the cause of action. *See id.* at 121 (citing *Owens-Illinois v. Armstrong*, 87 Md. App. 699, 724-25, 591 A.2d 544 (1991)). The Court explained:

> We agree with the Court of Special Appeals' conclusion that a cause of action in negligence . . . arises "when facts exist to support each element." In a negligence claim, the fact of injury would seemingly be the last element to come into existence. The breach, duty, and causation elements naturally precede the fact of injury.

Id. (citation omitted); *see Owens Corning v. Bauman*, 125 Md. App. 454, 480, 726 A.2d 745 (1999) ("Each of the elements of a claim must be met before a cause of action arises . . . ."); *Ford Motor Co. v. Wood*, 119 Md. App. 1, 45, 703 A.2d 1315, *cert. denied*, 349 Md. 494, 709 A.2d 139 (1998) ("[A] cause of action for negligence . . . arises when the injury first occurs."); *Anchor Packing Co. v. Grimshaw*, 115 Md. App. 134, 153, 692 A.2d 5 (1997), *vacated in part sub nom. Porter Hayden Co. v. Bullinger*, 350 Md. 452, 713 A.2d 962 (1998) (stating that a cause of action arises "when all the elements of the claim are satisfied"); *DiLeo v. Nugent*, 88 Md. App. 59, 77, 592 A.2d 1126 (1991) (concluding that a medical malpractice cause of action arises "when a negligent act, coupled with the resulting harm, amounts to a legally cognizable wrong").

Although the cases just referenced deal with *when* a "cause of action arises" in the context of CJ § 11-108(b), we see no reason why the same interpretation of the phrase should not be applied to *where* a "cause of action arises" under CJ § 6-202(8). *See Engel v. Gosper*, 71 N.J. Super. 573, 177 A.2d 595, 598 (N.J. Super. Ct. Law Div. 1962) (noting that state statute dictating that a wrongful death cause of action arises *when* death occurs also makes it "reasonable to conclude that [a wrongful death] cause of action arises *where* death occurs" (*emphasis added*)). We therefore hold that, under CJ § 6-202(8), "where the cause of action arises" is the place where all the elements of the negligence claim (duty, breach, causation, and injury) are satisfied. In negligence cases, because injury is the last element to come into existence, a cause of action in negligence arises *where the injury first occurs*.

Appellees argue that a cause of action in contract or tort arises *where the alleged breach occurs*. Appellees cite *Kane v. Schulmeyer*, 349 Md. 424, 708 A.2d 1038 (1998), in support of this position. Other than citing to *Kane*, appellees fail to point to any case that holds that a cause of action arises at the place of the breach. *Kane* does not hold that a cause of action in contract or tort arises where the breach occurs — the specific holding of *Kane* is that, in an action involving the breach of an agreement to pay money, a cause of action for breach of contract arises where payment was to be made; if no place of payment is specified in the agreement, then the cause of action arises where the creditor resides or has its place of business. *See id.* at 438, 708 A.2d 1038.

At issue in *Kane* was the breach of an agreement to repay a debt. In such actions, the breach and damages arising from the breach will always occur in the same place. In other words, as soon as the debtor fails to make payment at the proper place, the creditor has incurred damages at that location. The *Kane* Court did not address the issue of where a cause of action

arises when the breach occurs in one county and the injury occurs in another. As such, *Kane* does not support appellees' argument that a cause of action arises where the breach occurs.[8]

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[8] Our research has revealed that the majority of our sister states with venue statutes similar to ours have held that a tort cause of action arises at the place of injury. *See, e.g., Ebell v. Seapac Fisheries, Inc.*, 692 P.2d 956, 957-58 (Alaska 1984) (interpreting statute that placed venue in "the judicial district in which the claim arose" and holding that, in tort cases, this language placed venue where the plaintiff first suffered injury); *Tucker v. Fianson*, 484 So. 2d 1370, 1371-72 (Fla. Dist. Ct. App. 1986) (construing venue statute allowing suit to be brought "where the cause of action accrued" and holding that, in negligence suits, "the rule is well established that a cause of action accrues where the plaintiff suffers his or her injuries . . ."); *Gaboury v. Flagler Hosp., Inc.*, 316 So. 2d 642, 644 (Fla. Dist. Ct. App. 1975) ("[A] cause of action is said to arise at the place where the act creating the right to bring an action occurred, and when a tort is complete in a particular county, the cause of action is deemed to have accrued there so as to fix venue . . . ." (emphasis omitted)); *Wentz v. Montana Power Co.*, 280 Mont. 14, 928 P.2d 237 (1996) (holding that venue statute permitting tort suit in "the county where the tort was committed" allowed wrongful death cause of action to be brought only in county where death occurred; rejecting position that a tort is "committed" or "arises" where the negligent acts took place); *Engel v. Gosper*, 71 N.J. Super. 573, 177 A.2d 595, 597-98 (N.J. Super. Ct. Law Div. 1962) ("It is conceded by all counsel and seems well established that a cause of action for damages for personal injuries caused by negligent acts arises where the injuries are inflicted"; rejecting position that a wrongful death cause of action arises at the place where the allegedly wrongful acts occurred); *Emert v. Larami Corp.*, 414 Pa. 396, 200 A.2d 901, 902-04 (Pa. 1964) ("To constitute a tort, there must be an injury; mere negligence establishes no right of action. The place of wrong is, and the tort must be deemed to arise, where the injury is inflicted, not where the negligent acts leading to it were committed.") (emphasis omitted); *Action Indus. v. Wiedeman*, 236 Pa. Super. 447, 346 A.2d 798, 805 (1975) (construing statute placing venue in "the county in which the cause of action arose" and holding that, "[i]n a tort action, the cause of action arises where the injury is inflicted"). *But see, e.g., Ivey v. Padgett*, 502 So. 2d 22, 23 (Fla. Dist. Ct. App. 1986) ("In a tort action, the cause of action accrues where the act (or omission) creating the right to bring the action occurred."); *Spencer v. Flathead County*, 212 Mont. 399, 687 P.2d 1390, 1392 (1984) ("Where a cause of action arises is to be determined by inquiring where the

act or breach occurs which creates the necessity for bringing the suit."); *McGuire v. Fitzsimmons*, 197 W. Va. 132, 475 S.E.2d 132, 136-37 (W.Va. 1996) (noting that prior decisions have recognized that venue may arise in more than one county and holding that a legal malpractice cause of action arises either (1) where the attorney's duty came into existence; (2) where the breach of the duty occurs; or (3) where the damages from the breach occurs). *See generally* Jay M. Zitter, Annotation, *Place Where Claim or Cause of Action "Arose" Under State Venue Statute*, 53 A.L.R.4th 1104 (1987).

On the other hand, federal courts have taken a variety of different approaches in determining where a cause of action "arises" under the federal venue statute (28 U.S.C. § 1391). *See generally*, Annotation, *What Is the Judicial District "In Which the Claim Arose" for Venue Purposes Under 28 U.S.C.S. § 1391(a) and (b)*, 59 A.L.R. Fed. 320 (1982). Prior to 1990, title 28, section 1391(a), of the United States Code placed venue in diversity cases in the federal district "in which the claim arose." Some federal courts, like most state courts, interpreted this language as permitting venue only in the jurisdiction where the plaintiff first suffered injury ("place of injury" test). *See, e.g., Delta Educ., Inc. v. Langlois*, 719 F. Supp. 42, 49 (D.N.H. 1989); *Wade v. Olympus Indus.*, 695 F. Supp. 730, 734 (S.D.N.Y. 1988); *Quinn v. Bowmar Pub. Co.*, 445 F. Supp 780 (D. Md. 1978). Most federal courts, however, adopted one of two tests to determine where a claim arose — the "weight of contacts" test or the "substantial part" test. *See Missouri Hous. Dev. Comm'n v. Brice*, 919 F.2d 1306, 1309 (8th Cir. 1990); *Frontier Fed. Sav. & Loan Ass'n v. National Hotel Corp.*, 675 F. Supp. 1293, 1300 (D. Utah 1987); *Hodson v. A.H. Robins Co.*, 528 F. Supp. 809, 813 (E.D. Va. 1981), *aff'd*, 715 F.2d 142 (4th Cir. 1983).

Under the "weight of contacts" test, venue is proper in the district that has the most significant ties to the claim, and not proper in a district where merely insignificant conduct took place. *See Brice*, 919 F.2d at 1312; *Broadcasting Co. v. Flair Broadcasting Corp.*, 892 F.2d 372, (4th Cir. 1989); *Frontier*, 675 F. Supp. at 1301; *Hodson*, 528 F. Supp at 813; *Quinn v. Bowmar Pub. Co.*, 445 F. Supp. 780, 783 (D. Md. 1978); *Hindu Incense v. Meadows*, 439 F. Supp. 844, 847 (N.D. Ill. 1977); *California Clippers, Inc. v. United States Soccer Football Ass'n*, 314 F. Supp. 1057, 1063 (N.D. Cal. 1970); *Philadelphia Hous. Auth. v. American Radiator & Standard Sanitary Corp.*, 291 F. Supp. 252, 260 (E.D. Pa. 1968). It is noteworthy, however, that federal courts applying the "weight of contacts" test have given significant weight to the location of the injury in analyzing where a claim arose. *See Hodson*, 528 F. Supp. at 814; *Grappone, Inc. v. Subaru of*

America, Inc., 403 F. Supp. 123, 133 (D.N.H. 1975) (adopting the "weight of contacts test" but noting that "the place of injury should be given great weight and consideration by the court"). Other federal courts have used the "weight of contacts" test only in complex cases where injuries are present in multiple districts; for simple tort cases, these courts have stated that the "place of injury" test applies. *See California Clippers*, 314 F. Supp. at 1063; *Philadelphia Hous. Auth.*, 291 F. Supp. at 260 ("While it may be well to find that a tort claim arises in the jurisdiction where injury occurs, antitrust actions are not susceptible to such simplistic rationale.") (emphasis omitted).

The "substantial part" test places venue in the district in which a substantial part of the events or omissions giving rise to the claim occurred. *See, e.g., Lamont v. Haig*, 590 F.2d 1124, 1134-35 (D.C. Cir. 1978); *Commercial Lighting Prods., Inc. v. U.S. Dist. Court*, 537 F.2d 1078, 1080 (9th Cir. 1976); *Medical Emergency Serv. Assocs. v. Duplis*, 558 F. Supp. 1312 (N.D. Ill. 1983); *Hodson*, 528 F. Supp. at 815; *Thornwell v. United States*, 471 F. Supp. 344, 355-56 (D.D.C. 1979).

In *Leroy v. Great Western United Corp.*, 443 U.S. 173, 99 S.Ct. 2710, 61 L.Ed.2d 464 (1979), the Supreme Court had the opportunity to interpret section 1391, but the Court did not expressly endorse any particular test for determining where a claim arises. The Court determined where a claim arose by balancing the various relevant contacts between the claim and the districts. *See id.* at 186. Lower courts interpreting *Leroy* concluded that the Supreme Court's analysis implicitly rejected the "place of injury" test and indirectly endorsed the "weight of contacts" approach. *See Missouri Hous. Dev. Comm'n*, 919 F.2d at 1311; *Broadcasting Co.*, 892 F.2d at 372; *Dody v. Brown*, 659 F. Supp. 541, 550 (W.D. Mo. 1987) ("*Leroy* did not overrule those cases applying the weight of the contacts test.").

The confusion among the federal courts ended in 1990 when Congress adopted the "substantial part" test by replacing the "claim arose" language in section 1391 with "a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred . . . ." 28 U.S.C. § 1391(a)(2) & (b)(2) (1994 & Supp. 1997).

Even though many federal cases have determined that a claim "arises" in a district other than the place of injury, appellees make no argument that we should adopt a "weight of contacts" or "significant part" approach. In addition, we note that the Court of Appeals in *Kane* expressly rejected these approaches to venue. The *Kane* Court noted that there were a "bewildering variety of tests to ascertain where claim arose" under the federal venue

We therefore reject appellees' interpretation of the language in CJ § 6-202(8) and hold that a cause of action in negligence arises where the injury first occurs.

B. *Where Did Darwin First Suffer Injury?*

Appellants presently contend that because Darwin suffered his cardiac arrest and brain damage at the University of Maryland Hospital in Baltimore City, the cause of action arose in Baltimore City because this is where he manifested injury proximately caused by NAH's and Dr. Fields' alleged breach of the standard of care. On the other hand, appellees maintain that, after his discharge from NAH on August 18, 1988, and due to his undiagnosed shunt malfunction, Darwin incurred pain and suffering injuries in Anne Arundel County, before he was transported to Baltimore City, and therefore the cause of action arose in Anne Arundel County.

In *Edmonds v. Cytology Services*, 111 Md. App. 233, 681 A.2d 546 (1996), *aff'd sub nom., Rivera v. Edmonds*, 347 Md. 208, 699 A.2d 1194 (1997), we said:

> A patient sustains an "injury" . . . when, as a result of the tort, he or she first sustains compensable damages that can be proven with reasonable certainty. Therefore, the patient could suffer an "injury" as a result of a negligent misdiagnosis, when (1) he or she experiences pain or other manifestation of an injury; (2) the disease advances beyond the point where it was at the time of the misdiagnosis and to a point where (a) it can no longer effectively be treated, (b) it cannot be treated as well or as completely as it could have been at the time of the misdiagnosis, or (c) the treatment would entail expense or detrimental side

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statute and that there was no need for Maryland courts "to wander into that thicket." 349 Md. at 438-39 n.6, 708 A.2d 1038.

> effects that would not likely have occurred had treatment commenced at the earlier time; or (3) the patient dies. This is not, of course, an exhaustive checklist; the overriding inquiry in all cases must be when the patient first sustained legally compensable damages. In any event, the injury occurs, as we have observed, when legally compensable tort damages *first* occur, regardless of whether those damages are discoverable or undiscoverable.

Id. at 270 (citations omitted). Given this definition of injury, we agree with appellees that Darwin first suffered injury in Anne Arundel County.

During discovery, one of the interrogatories propounded to appellants was:

> Describe in detail the injuries, disabilities, and infirmities which you claim that [Darwin] sustained as a result of the occurrence which is the subject matter of this suit, and when each such injury, disability, or infirmity occurred.

Appellants' answer to this interrogatory was:

> At the time [Darwin] was in the care of the Defendants *at North Arundel Hospital*, the child's *intracranial pressure was constantly increasing causing neurological deterioration* moving him inevitably toward and ultimately causing massive brain injuries. . . .

(Emphasis added.) This interrogatory answer shows that appellants claimed that the defendants caused Darwin to suffer injury in the form of "neurological deterioration" and increased intracranial pressure while at NAH, located in Anne Arundel County.

In addition, at trial, appellants' medical expert, Dr. Buchholz, testified that if the doctors at NAH had properly diagnosed Darwin as having a shunt malfunction on August 18, 1988, then he would have been referred to the University of Maryland Hospital twenty-four to twenty-five hours earlier for a shunt revision. *See supra* note 7. Instead, because of this alleged misdiagnosis, Darwin was sent to his home in Anne Arundel County. While at his home, Darwin experienced pain and suffering in the form of headaches and drowsiness caused by his increasing intracranial pressure. The next day, at Dr. Lee's office in Anne Arundel County, Darwin continued to complain of a headache and drowsiness, and Dr. Lee also noted that Darwin had a "staggering gait" — a common symptom of increased intracranial pressure. Overall, Darwin's condition continued to worsen after his release from NAH, and this worsening took place in Anne Arundel County. In short, Darwin experienced pain and suffering injury in Anne Arundel County due to appellees' alleged negligent failure to diagnose the blocked shunt. Darwin's pain and suffering could have been limited if he had been referred immediately to the University of Maryland Hospital for a shunt revision. In this regard, Dr. Buchholz testified on cross-examination as follows:

> Q Okay. Now, in response to . . . whether Darwin Green had sustained injury between the time he was seen at North Arundel Hospital and the time of his [cardiac] arrest, some time around midday on the 20th, you had mentioned . . . that [Darwin] had sustained no irreversible injury. But, in fact, you're willing to go further than that and say that he sustained no injury whatsoever; is that true?
>
> A I mean, *if you mean symptoms as being some form of injury, he had some symptoms which had increased.* But I think in the sense that we really mean the term some sort of permanent damage, that is

> true that he had not sustained permanent damage prior to the arrest.

(Emphasis added.)

In sum, because appellants' own evidence showed that Darwin *first* experienced injury in the form of "neurological deterioration" and pain and suffering in Anne Arundel County, the cause of action arose in that county. Accordingly, Judge Rombro did not err in transferring the case out of Baltimore City.[9] The fact that Darwin experienced more serious injuries later in Baltimore City is of no consequence for venue purposes — the cause of action was complete as soon as Darwin first experienced *any* injury from the alleged negligent acts of NAH and Dr. Fields.

Issue 2

Both sides agree that Dr. Mody carries on his business and maintains an office in Baltimore City. Appellants' second claim is that Judge Rushworth erred in failing to transfer the case back to the Circuit Court for Baltimore City once Dr. Mody was added to the action. Appellants argue that the addition of Dr. Mody to the case made venue proper in Baltimore City under the multiple defendant provision of CJ § 6-201(b).

Appellants' argument is without merit because, at the time that Judge Rushworth denied appellants' motion to transfer the case back to Baltimore City, Dr. Mody had not been named as a defendant in the case. The court denied appellants' motion to

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[9] The interrogatory and its answer, and the testimony showing that Darwin first experienced injury in Anne Arundel County, were elicited after the Circuit Court for Baltimore City made its venue ruling. Nevertheless, it would be an exercise in futility to remand this case to determine where Darwin first experienced injury when appellants' own evidence shows that Darwin incurred pain and suffering injuries in Anne Arundel County.

transfer on August 2, 1996. Appellants did not amend their complaint to add Dr. Mody to this case until August 8, 1996. Thereafter, appellants never renewed their motion to transfer. Because Dr. Mody was not a defendant in the case at the time Judge Rushworth decided the motion, there was no basis for him to grant the transfer. As such, there was no error.

Issue 3

Appellants next contend that the trial court erred as a matter of law in excluding Darwin from the courtroom during the liability phase of the trial because such exclusion was: (A) a violation of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (1994) (hereinafter "ADA"); (B) a violation of federal and state due process; and (C) a violation of the First and Fourteenth Amendments' implicit rights guaranteeing the public access to trials.

A. *Americans With Disability Act*

Title II of the ADA, 42 U.S.C. §§ 12131-12165 (1994), deals with discrimination against disabled persons by public entities.[10] Section 12132 states:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

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[10] Under the ADA's definition, state courts are public entities. *See* 42 U.S.C. § 12131(1)(B) (1994); *Layton v. Elder*, 143 F.3d 469, 472 (8th Cir. 1998); *Galloway v. Superior Court*, 816 F. Supp. 12, 19 (D.D.C. 1993); *State v. P.E.*, 284 N.J. Super. 309, 664 A.2d 1301, 1304 (N.J. Super. Ct. Law Div. 1994); *People v. Caldwell*, 159 Misc.2d 190, 603 N.Y.S.2d 713, 714 (N.Y. Chili. Ct. 1993).

Federal regulations implementing the requirements of the ADA state:

> A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

28 C.F.R. § 35.130(b)(7) (1999); *see Weinreich v. Los Angeles County Metro. Transp. Auth.*, 114 F.3d 976, 979 (9th Cir. 1997), *cert. denied*, __U.S.__, 118 S.Ct. 423, 139 L.Ed.2d 324 (1997).

Once a qualified individual with a disability[11] requests a reasonable modification, and the public entity denies the request, Title II sets forth various procedural mechanisms[12] by which that individual can seek injunctive relief to force the public entity to make the reasonable modifications to allow the

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[11] A "qualified individual with a disability" is defined as:

> [A]n individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets 42 U.S.C. §§ 12131-12165 (1994), the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

42 U.S.C. § 12131(2) (1994).

[12] Plaintiffs alleging a violation of the ADA by a public entity can: (1) complain under the public entity's internal grievance procedure, if available; (2) file an administrative complaint with a designated federal agency or the United States Department of Justice within 180 days of the date that the alleged discrimination occurred; or (3) file suit in court for injunctive relief. *See* 42 U.S.C. § 12133 (1994); 28 C.F.R. §§ 35.107(b), 35.170-35.175 (1998).

disabled individual access to the services, programs, or activities of the public entity.[13] In short, the ADA allows for action only *against the public entity for prospective injunctive relief* — there is nothing in the ADA that provides a basis for reversing the judgment of a lower court in a civil dispute between private parties. Therefore, assuming, *arguendo*, that Judge Rushworth's ruling constituted a violation of the ADA, this would only give Darwin a separate cause of action for injunctive relief against the trial judge in his official capacity as a judicial officer of the State[14] — it would not constitute reversible error in the case *sub judice*. Thus, whether Judge Rushworth's exclusion of Darwin from trial violates the ADA is irrelevant to the outcome of this case.

B. *Due Process*

Appellants also argue that the exclusion of Darwin from the liability phase of the trial violated his due process rights under the United States and Maryland Constitutions. For reasons set forth below, we disagree.

A party does not have an absolute right to attend trial. *See Helminski v. Ayerst Lab.*, 766 F.2d 208 (6th Cir. 1985); *Marks v. Mobil Oil Corp.*, 562 F. Supp. 759, 768 (E.D. Pa. 1983),

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[13] Attorney's fees and court costs are also recoverable, but monetary damages are not permitted for a violation of Title II of the ADA. *See* 28 C.F.R. § 35.175 (1998); *Tyler v. City of Manhattan*, 857 F. Supp. 800, 819 (D. Kan. 1994); *Coleman v. Zatecka*, 824 F. Supp. 1360, 1374 n.30 (D. Neb. 1993).

[14] So far, no court has considered the issue of whether the exclusion of a disabled plaintiff from a civil trial violates the ADA. *See Cary v. Oneok, Inc.*, 940 P.2d 201, 205 n.6 (Okla. 1997); Matthew A. Sokol, *Cary v. Oneok, Inc.: Oklahoma Supreme Court Upholds Plaintiff's Right to Attend Trial*, 19 Pace L. Rev. 195, 214 (1998) ("The issue of whether the [ADA] gives rise to a cognizable cause of action for a plaintiff who is excluded from trial is yet to be litigated."). We express no opinion as to the merits of such an action under the facts of this case.

case law specifying the circumstances under which the exclusion of a party from trial offends due process, many courts faced with this issue have adopted the reasoning used by the Sixth Circuit Court of Appeals in *Helminski*. *See, e.g.*, *Hines v. Wilkinson*, 163 F.R.D. 262, 265-68 (S.D. Ohio 1995); *Province v. Center for Women's Health & Family Birth*, 20 Cal. App. 4th 1673, 25 Cal. Rptr. 2d 667, 675 (1993) (noting that *Helminski* "surveyed, considered, and discussed the rules which had been applied to a broad range of cases" dealing with the exclusion of parties from trial); *Cary*, 940 P.2d at 205; *Brenner v. Charles*, 312 Or. 274, 821 P.2d 1080, 1085 (1991), *modified by*, 313 Or. 339, 832 P.2d 454 (1992).

In *Helminski*, the plaintiffs alleged that the minor plaintiff's mother's exposure during pregnancy to a surgical anesthetic manufactured by the defendant caused injury to the minor's nervous system when he was a fetus. *See* 766 F.2d at 210. The defendants moved to exclude the minor from trial, arguing that his appearance before the jury would be prejudicial to their case. *See id.* at 213. At the time of trial, the minor required twenty-four hour a day care, did not speak, was not toilet trained, and had an extremely low IQ. *See id.* at 210. The trial judge bifurcated the proceedings and excluded the minor from the liability phase of the trial. *See id.* at 211. On appeal to the Sixth Circuit, the plaintiffs argued, *inter alia*, that the exclusion of the minor deprived him of his Fifth Amendment right to due process. *See id.* at 213.

The *Helminski* court held that, although a plaintiff does not have an absolute right to be present in the courtroom, due process prevents a court from arbitrarily excluding a party from trial. *See id.* According to the court, in cases where the plaintiff has a severe injury that may potentially prejudice the jury and the plaintiff is unable to comprehend the proceedings

or aid counsel, exclusion of the plaintiff does not offend due process. *See id.* at 217. The court stated:

> Although under some circumstances the mere sight by a jury of a severely injured plaintiff may evoke juror sympathy, juror sympathy alone is insufficient to establish juror prejudice. Generally, the jury will follow the court's instructions and fulfill its promise to decide the case solely on the facts. On the other hand, there may be occasions when the mere presence of a party would render the jury unable to arrive at an unbiased judgment concerning liability. Should such a case arise and the presence of the party would not aid the fair administration of justice, the trial court can exclude the plaintiff or limit his presence. A party's involuntary exclusion under these circumstances would not constitute a denial of due process. Nevertheless, absent disruptive behavior, involuntary exclusion of a party who is able to comprehend the proceedings and aid counsel would constitute a denial of due process since exclusion of such party would deny him the right to obtain a fair trial.

Id.; *see also Morley v. Superior Court*, 131 Ariz. 85, 638 P.2d 1331, 1334 (1981) (holding that plaintiff, who was comatose, required a tracheostomy to breathe, was fed via a feeding tube, was unable to communicate with his lawyers, and was properly excluded from liability phase of trial because his presence would prejudice the jury); *Dickson v. Bober*, 269 Minn. 334, 130 N.W.2d 526, 530 (1964) (holding that because plaintiff was unable to testify or comprehend the proceedings, he possessed no absolute right to be present at trial so long as his rights were protected by his attorney and guardian who brought the action on his behalf).

The *Helminski* court set forth a two-step inquiry to determine whether a party's exclusion from trial comports with due process.

> [T]he defendant who seeks to exclude a handicapped plaintiff must establish at a hearing that the plaintiff's presence would prevent or substantially impair the jury's performance of its factfinding task. The requisite showing of prejudice cannot be satisfied simply by establishing that a plaintiff has a physical or mental injury; the party seeking the exclusion must establish that the party's appearance or conduct is likely to prevent the jury from performing its duty. . . .
>
> Should the [trial] court determine that the party's mere presence would be prejudicial, the court must next consider whether the party can understand the proceedings and aid counsel. If the trial court concludes that the party can comprehend the proceedings and assist counsel in a meaningful way, the party cannot be involuntarily excluded regardless of prejudicial impact; in such a case, cautionary instructions will protect the interests of the defendant in a fair trial.

Id. at 218. The court then stated that if a trial court concludes that the plaintiff's presence would substantially prejudice the jury and the plaintiff would be unable to assist counsel or comprehend the proceedings, then the trial judge should bifurcate the case into separate trials on liability and damages, and exclude the plaintiff from the liability phase. *See id.* at 217. The court noted, however, that the exclusion of a party from the damages portion of the proceedings would never be appropriate. *See id.* Applying this analysis to the facts of *Helminski*, the Sixth Circuit found error because the trial judge never observed the minor plaintiff to determine whether his

appearance would prejudice the proceedings. *See id.* at 218. Nevertheless, the *Helminski* court concluded that this error was harmless and affirmed the trial judge's decision. *See id.*

Applying the *Helminski* analysis to the case at bar, we find no constitutional violation in Darwin's exclusion from the liability portion of the trial. Prior to the start of trial, Judge Rushworth held a hearing on the defendants' motion to exclude. Judge Rushworth stated that he had read the *Helminski* case, had the opportunity to watch a "day in the life" video[15] film that showed Darwin being tended to by his nurses, and had considered Darwin's medical records. Judge Rushworth then stated on the record:

> Let me address that video which goes on at length showing the Plaintiff virtually motionless except for some eye blinking and except for periods of time when instruments were inserted by way of the feeding tube and the suctioning from the neck or throat area which the court understands by the records is done periodically, perhaps as often as every two hours. At that point, there is some jerking movement that lifts his legs and the extension of his arms above and about the bed he lies in.
>
> * * *
>
> . . . . Unlike the judge in *Helminski*, this Court then has an opportunity short of actually visiting with the [p]laintiff and the time in light of the fact that we

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[15] A trial judge's viewing of a video prepared by the plaintiffs showing a "day in the life" of the disabled plaintiff in lieu of actually observing the plaintiff in person has been held to allow sufficient fact-finding by the trial judge in order to decide whether the plaintiff's presence at the liability phase of the trial would be prejudicial. *See Reems v. St. Joseph's Hosp. and Health Ctr.*, 536 N.W.2d 666, 670 (N.D. 1995).

are going to try this case in the morning precludes that visit.

But short of that, the [c]ourt feels confident to do some fact finding. And those facts are that and this particular [p]laintiff does not have the ability to communicate in any fashion with counsel or his parents or the nurses in this video. And the [c]ourt is convinced that he will not be able to aid his counsel in prosecuting the case and offering any sort of input beyond that.

. . . . The [c]ourt finds then that he is reduced to the vegetable state. That there can be no purpose in presenting the [p]laintiff short of prejudice to the [d]efendant's case.

. . . . In this instance, there can be no input to the [p]laintiff's counsel. The Court cannot arbitrarily deny a party's right to be present during trial because of the party's appearance, but the possibility of prejudice is to be weighed.

And in this instance, the [c]ourt finds that it is great beyond the extension of any instructions that could be offered and will be offered in all likelihood in any case as to sympathy or prejudice public opinion. In this instance, the [c]ourt finds that . . . to grant a fair trial which would go to all parties would require excluding the [p]laintiff. . . .

* * *

The burden of persuasion is on the moving party and they have carried that burden in this instance. The [d]efendant who seeks to exclude a handicapped plaintiff must establish that the presence of the plaintiff would prevent and substantially impair the

> jury's performance. The impairment or the prejudice must be so great that the jury instructions will not likely correct that prejudice.
>
> And having viewed the tape, the [c]ourt is convinced that any viewing of the [p]laintiff in person or by video would leave any party in a position to be emotionally struck and otherwise feeling sympathy for the [p]laintiff. This trial is also a matter which is bifurcated. We addressed the matter of liability. And so, therefore, the [c]ourt sees no necessity as it would if and when we are at the state of the position of the trial addressing damages to have the [p]laintiff present.
>
> Obviously, if the case were not bifurcated, or at least, I think, the [c]ourt would have a different slant on the particular circumstances which at some point it will certainly be necessary going beyond liability to address damages and then, of course, to have the [p]laintiff presented if th[ose] are the wishes of the prosecutors of the claim.

The above-quoted findings show that Judge Rushworth went to great lengths to ensure that Darwin's constitutional rights were not violated by arbitrarily excluding him from trial.

C. *Public Access to Trial*

Appellants' final argument against Darwin's exclusion is based on the right of the public to attend trials. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 581, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980) (holding that the right to attend trials is implicit in the guarantees of the First Amendment). Appellants argue that "[i]f Darwin Green were not a party to this action, and were merely an observer, he would have had every right to public access to the court proceedings under [the

law]. It follows that Darwin Green had every right to be present in court as a party to this action . . . ." We disagree with appellants' premise. Just as the right of a party to attend trial is not without limitation, the right of the public to attend a trial as an observer is also not absolute. The Supreme Court in *Richmond Papers* noted this very fact in its opinion:

> We have no occasion here to define the circumstances in which all or parts of a . . . trial may be closed to the public, but our holding today does not mean that the First Amendment rights of the public and representatives of the press are absolute. Just as a government may impose reasonable time, place, and manner restrictions upon the use of its streets in the interest of such objectives as the free flow of traffic, so may a trial judge, in the interest of the fair administration of justice, impose reasonable limitations on access to a trial.

Id. at 581 n.18 (citations omitted). Thus, it is clear that Darwin did not have an absolute right to attend the trial as an observer — the trial judge had discretion to exclude anyone from the courtroom "in the interest of the fair administration of justice." *Id.* Given the fact that Judge Rushworth already concluded that Darwin's presence would prejudice the proceedings, there was no abuse of discretion in barring Darwin from the courtroom.

D. *Other Matters*

What we have said thus far concerning Darwin's exclusion from the courtroom is dicta. Even if we were to have decided that Darwin should not have been excluded from the courtroom, appellants have failed to show that the error was prejudicial. *See Bradley v. Hazard Tech. Co.*, 340 Md. 202, 206, 665 A.2d 1050 (1995) ("Unless an appellant can

demonstrate that a *prejudicial* error occurred below, reversal is not warranted." (emphasis added)).

As noted previously, the trial court granted a motion for judgment in favor of NAH and Dr. Mody at the conclusion of the plaintiffs' case. The propriety of the grant of judgment was not challenged in this appeal. Whether Darwin had been in the courtroom during the entire trial up to the point where the motions were granted could not possibly have helped appellants prove their case against NAH or Dr. Mody.

With respect to Drs. Fields and Axelbaum, the jury answered "no" to the special verdict form question, "do you find the plaintiff has proven that [either Dr. Fields or Dr. Axelbaum] departed from accepted standards of care in the treatment of Darwin Green?" If Darwin had been present during every minute of the trial, his presence could not have affected the answer to that standard of care question.

Appellants argue:

> Darwin Green must demonstrate his condition in order to illustrate an element of the applicable standard of care involved in this specific case. The standard of care for the proper treatment of a patient is not cut and dry but rather is necessarily fluid depending upon differing circumstances. One vital element in determining the standard of care in a given circumstance is clearly the foreseeable consequences of committing an error. A case in which it is known to the physician that a mistake has a very high likelihood of devastating injury to the patient must obviously be handled with the utmost care. The risk to the patient, at least in part, dictates the required caution to be exercised by the physician. A splinter must be removed more carefully from a brain than from a finger. What informs this exercise of care if

> the physician's awareness of foreseeable possible consequences of error.

This is pure sophistry. The jury was well aware of Darwin's vegetative state. During Dr. Buchholz's direct examination, the following colloquy occurred:

> Q [PLAINTIFF'S COUNSEL] Now, what happened . . . to Darwin as a result of the cardiac arrest?
>
> A As a result of the cardiac arrest, he suffered . . . decreased oxygen . . . and blood supply to the brain. He suffered brain damage from those two things in the course of his arrest, and *he is now in a chronic vegetative state.*

(Emphasis added.) Furthermore, during closing argument, plaintiff's counsel stated: "I don't think there was any dispute that Darwin was injured and that he is currently in a persistent vegetative state." Finally, voluminous medical records from Darwin's stay at the University of Maryland Hospital were introduced into evidence. These records clearly set forth Darwin's post-cardiac arrest condition. Accordingly, appellants have failed to demonstrate prejudice resulting from the "error" of excluding Darwin from the courtroom.

Issue 4

Appellants' final assertion is that the trial judge erred by allowing appellees to present a theory of their case that was against Maryland case law as set forth in *Mehlman v. Powell*, 281 Md. 269 (1977). In *Mehlman*, the Court of Appeals held that an emergency room physician's misdiagnosis of a patient's condition was still a proximate cause of the patient's death, despite the fact that it may have been accompanied by the subsequent negligence of other physicians. *See id.* at 275-76. Appellants take issue with a number of statements made by

defense counsel during opening and closing statements that they believe gave the jury the impression that if the jury found that doctors at the University of Maryland Hospital were negligent or caused Darwin's injuries, then the jury could not conclude that either Dr. Fields's or Dr. Axelbaum's actions were the proximate cause of Darwin's injuries.

This issue has not been preserved for appellate review. None of the statements that appellants point to in the brief were objected to at trial. As such, this claim is waived. *See Grier v. State*, 116 Md. App. 534, 544-45, 698 A.2d 1133 (1997), *rev'd on other grounds*, 351 Md. 241, 718 A.2d 211 (1998) (objections to improper argument of counsel must be made either contemporaneously or before jurors are excused from courtroom to preserve issue for appellate review).

It is true that appellants did make a motion in limine prior to trial to exclude any discussion before the jury of the negligence of the University of Maryland Hospital. Nevertheless, a motion in limine is not the equivalent of a continuing objection — when a party makes a motion in limine to prevent counsel from making an argument and the motion is denied, the party who made the motion must object at the time the argument is made to the jury in order to preserve the objection for appellate review. *See Reed v. State*, 353 Md. 628, 643, 728 A.2d 195 (1999) (when a motion in limine is denied, a contemporaneous objection to evidence must be made when the evidence is admitted at trial to preserve the issue for appellate review); *United States Gypsum Co. v. Mayor & City Council*, 336 Md. 145, 174, 647 A.2d 405 (1994); *Prout v. State*, 311 Md. 348, 356, 535 A.2d 445 (1988); *Collier v. Eagle-Picher Indus.*, 86 Md. App. 38, 62, 585 A.2d 256 (1991); *Beghtol v. Michael*, 80 Md. App. 387, 394, 564 A.2d 82 (1989).

Furthermore, even if we assume that appellees' counsel did make improper causation arguments, the "error" in allowing

such arguments was rendered moot by the jury's verdict. The jury never even got to the issue of causation because they concluded that the plaintiffs had failed to prove that either Drs. Fields or Axelbaum departed from the appropriate standard of care in their treatment of Darwin.

Finally, appellants present us with a hodgepodge of tangential arguments in the closing pages of their brief involving a host of evidentiary rulings and jury instructions. Confusingly, all of these arguments appear in the section of their brief where appellants seek to answer Issue 4 ("Did the trial court err in allowing [a]ppellees to present a theory of their case that is against Maryland case law as stated in *Mehlman v. Powell*?"). None of these last referred to arguments concern the proximate cause issue considered in *Mehlman*. We therefore decline to address any of these issues because they were not set forth in the "Questions Presented" section of appellants' brief.[16] *See* Md. Rule 8-504(a)(3) (A brief shall contain "[a] statement of the questions presented, separately numbered, indicating the legal propositions involved and the questions of fact at issue expressed in the terms and circumstances of the case without unnecessary detail.") Appellants can waive issues for appellate review by failing to mention them in their "Questions Presented" section of their brief. Confining litigants to the issues set forth in the "Questions Presented" segment of their brief ensures that the issues presented are obvious to all parties and the Court. *See Davis v. DiPino*, 354 Md. 18, 561, 729 A.2d 354 (1999).

JUDGMENT AFFIRMED;
COSTS TO BE PAID BY APPELLANTS.

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[16] Even if these issues had been properly raised on appeal, we would find that they had no merit for the reasons set forth in the brief filed by Drs. Fields and Axelbaum.

APPENDIX C

UNITED STATES ANNOTATED CODE
TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 126. EQUAL OPPORTUNITY FOR INDIVIDUALS WITH DISABILITIES

Sec. 12101. Findings and purpose

(a) Findings

The Congress finds that —

(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of

architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

(b) Purpose

It is the purpose of this chapter –

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities

Sec. 12102. Definitions

As used in this chapter:

(1) Auxiliary aids and services

The term "auxiliary aids and services" includes –

(A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

(B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;

(C) acquisition or modification of equipment or devices; and

(D) other similar services and actions.

(2) Disability

The term "disability" means, with respect to an individual -

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

(3) State

The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands

* * * *

Sec. 12131. Definitions

As used in this subchapter:

(1) Public entity

The term "public entity" means –

(A any State or local government;

(B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and

(C) the National Railroad Passenger Corporation, and any commuter authority (as defined in section 502(8) of title 45).

(2) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity

Sec. 12132. Discrimination

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

* * * *

Sec. 12134. Regulations

(a) In general

Not later than 1 year after July 26, 1990, the Attorney General shall promulgate regulations in an accessible format that implement this part. Such regulations shall not include any matter within the scope of the authority of the Secretary of Transportation under section 12143, 12149, or 12164 of this title.

(b) Relationship to other regulations

Except for "program accessibility, existing facilities", and "communications", regulations under subsection (a) of this section shall be consistent with this chapter and with the coordination regulations under part 41 of title 28, Code of Federal Regulations (as promulgated by the Department of Health, Education, and Welfare on January 13, 1978), applicable to recipients of Federal financial assistance under section 794 of title 29. With respect to "program accessibility,

existing facilities", and "communications", such regulations shall be consistent with regulations and analysis as in part 39 of title 28 of the Code of Federal Regulations, applicable to federally conducted activities under section 794 of title 29.

(c) Standards

Regulations under subsection (a) of this section shall include standards applicable to facilities and vehicles covered by this part, other than facilities, stations, rail passenger cars, and vehicles covered by part B of this subchapter. Such standards shall be consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board in accordance with section 12204(a) of this title.

* * * *

APPENDIX D

CODE OF FEDERAL REGULATIONS TITLE 28—JUDICIAL ADMINISTRATION CHAPTER I—DEPARTMENT OF JUSTICE PART 35—NONDISCRIMINATION ON THE BASIS OF DISABILITY IN STATE AND LOCAL GOVERNMENT SERVICES

Current through January 1, 2002; 66 FR 67702

Appendix A to Part 35--Preamble to Regulation on Nondiscrimination on the Basis of Disability in State and Local Government Services (Published July 26, 1991)

Note: For the convenience of the reader, this appendix contains the text of the preamble to the final regulation on nondiscrimination on the basis of disability in State and local government services beginning at the heading "Section-by-Section Analysis" and ending before "List of Subjects in 28 CFR Part 35" (56 FR 35696, July 26, 1991).

Section-by-Section Analysis

Subpart A—General

Section 35.101 Purpose

Section 35.101 states the purpose of the rule, which is to effectuate subtitle A of title II of the Americans with Disabilities Act of 1990 (the Act), which prohibits discrimination on the basis of disability by public entities. This part does not, however, apply to matters within the scope of the authority of the Secretary of Transportation under subtitle B of title II of the Act.

Section 35.102 Application

This provision specifies that, except as provided in paragraph (b), the regulation applies to all services, programs,

and activities provided or made available by public entities, as that term is defined in § 35.104. Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), which prohibits discrimination on the basis of handicap in federally assisted programs and activities, already covers those programs and activities of public entities that receive Federal financial assistance. Title II of the ADA extends this prohibition of discrimination to include all services, programs, and activities provided or made available by State and local governments or any of their instrumentalities or agencies, regardless of the receipt of Federal financial assistance. Except as provided in § 35.134, this part does not apply to private entities.

The scope of title II's coverage of public entities is comparable to the coverage of Federal Executive agencies under the 1978 amendment to section 504, which extended section 504's application to all programs and activities "conducted by" Federal Executive agencies, in that title II applies to anything a public entity does. Title II coverage, however, is not limited to "Executive" agencies, but includes activities of the legislative and judicial branches of State and local governments. All governmental activities of public entities are covered, even if they are carried out by contractors. For example, a State is obligated by title II to ensure that the services, programs, and activities of a State park inn operated under contract by a private entity are in compliance with title II's requirements. The private entity operating the inn would also be subject to the obligations of public accommodations under title III of the Act and the Department's title III regulations at 28 CFR part 36.

Aside from employment, which is also covered by title I of the Act, there are two major categories of programs or activities covered by this regulation: those involving general public contact as part of ongoing operations of the entity and those directly administered by the entities for program beneficiaries

and participants. Activities in the first category include communication with the public (telephone contacts, office walk-ins, or interviews) and the public's use of the entity's facilities. Activities in the second category include programs that provide State or local government services or benefits.

Paragraph (b) of § 35.102 explains that to the extent that the public transportation services, programs, and activities of public entities are covered by subtitle B of title II of the Act, they are subject to the regulation of the Department of Transportation (DOT) at 49 CFR part 37, and are not covered by this part. The Department of Transportation's ADA regulation establishes specific requirements for construction of transportation facilities and acquisition of vehicles. Matters not covered by subtitle B, such as the provision of auxiliary aids, are covered by this rule. For example, activities that are covered by the Department of Transportation's regulation implementing subtitle B are not required to be included in the self- evaluation required by § 35.105. In addition, activities not specifically addressed by DOT's ADA regulation may be covered by DOT's regulation implementing section 504 for its federally assisted programs and activities at 49 CFR part 27. Like other programs of public entities that are also recipients of Federal financial assistance, those programs would be covered by both the section 504 regulation and this part. Although airports operated by public entities are not subject to DOT's ADA regulation, they are subject to subpart A of title II and to this rule.

Some commenters asked for clarification about the responsibilities of public school systems under section 504 and the ADA with respect to programs, services, and activities that are not covered by the Individuals with Disabilities Education Act (IDEA), including, for example, programs open to parents or to the public, graduation ceremonies, parent-teacher organization meetings, plays and other events open to the

public, and adult education classes. Public school systems must comply with the ADA in all of their services, programs, or activities, including those that are open to parents or to the public. For instance, public school systems must provide program accessibility to parents and guardians with disabilities to these programs, activities, or services, and appropriate auxiliary aids and services whenever necessary to ensure effective communication, as long as the provision of the auxiliary aids results neither in an undue burden or in a fundamental alteration of the program.

Section 35.103 Relationship to Other Laws

Section 35.103 is derived from sections 501 (a) and (b) of the ADA. Paragraph (a) of this section provides that, except as otherwise specifically provided by this part, title II of the ADA is not intended to apply lesser standards than are required under title V of the Rehabilitation Act of 1973, as amended (29 U.S.C. 790-94), or the regulations implementing that title. The standards of title V of the Rehabilitation Act apply for purposes of the ADA to the extent that the ADA has not explicitly adopted a different standard than title V. Because title II of the ADA essentially extends the antidiscrimination prohibition embodied in section 504 to all actions of State and local governments, the standards adopted in this part are generally the same as those required under section 504 for federally assisted programs. Title II, however, also incorporates those provisions of titles I and III of the ADA that are not inconsistent with the regulations implementing section 504. Judiciary Committee report, H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 3, at 51 (1990) (hereinafter "Judiciary report") ; Education and Labor Committee report, H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 2, at 84 (1990) (hereinafter "Education and Labor report"). Therefore, this part also includes appropriate provisions derived from the regulations implementing those titles. The inclusion of specific language

in this part, however, should not be interpreted as an indication that a requirement is not included under a regulation implementing section 504.

Paragraph (b) makes clear that Congress did not intend to displace any of the rights or remedies provided by other Federal laws (including section 504) or other State laws (including State common law) that provide greater or equal protection to individuals with disabilities. As discussed above, the standards adopted by title II of the ADA for State and local government services are generally the same as those required under section 504 for federally assisted programs and activities. Subpart F of the regulation establishes compliance procedures for processing complaints covered by both this part and section 504.

With respect to State law, a plaintiff may choose to pursue claims under a State law that does not confer greater substantive rights, or even confers fewer substantive rights, if the alleged violation is protected under the alternative law and the remedies are greater. For example, a person with a physical disability could seek damages under a State law that allows compensatory and punitive damages for discrimination on the basis of physical disability, but not on the basis of mental disability. In that situation, the State law would provide narrower coverage, by excluding mental disabilities, but broader remedies, and an individual covered by both laws could choose to bring an action under both laws. Moreover, State tort claims confer greater remedies and are not preempted by the ADA. A plaintiff may join a State tort claim to a case brought under the ADA. In such a case, the plaintiff must, of course, prove all the elements of the State tort claim in order to prevail under that cause of action.

* * * *

Section 35.106 Notice

Section 35.106 requires a public entity to disseminate sufficient information to applicants, participants, beneficiaries, and other interested persons to inform them of the rights and protections afforded by the ADA and this regulation. Methods of providing this information include, for example, the publication of information in handbooks, manuals, and pamphlets that are distributed to the public to describe a public entity's programs and activities; the display of informative posters in service centers and other public places; or the broadcast of information by television or radio. In providing the notice, a public entity must comply with the requirements for effective communication in § 35.160. The preamble to that section gives guidance on how to effectively communicate with individuals with disabilities.

Section 35.107 Designation of Responsible Employee and Adoption of Grievance Procedures

Consistent with § 35.105, self-evaluation, the final rule requires that public entities with 50 or more employees designate a responsible employee and adopt grievance procedures. Most of the commenters who suggested that the requirement that self-evaluation be maintained on file for three years not be limited to those employing 50 or more persons made a similar suggestion concerning § 35.107. Commenters recommended either that all public entities be subject to § 35.107, or that "50 or more persons" be changed to "15 or more persons." As explained in the discussion of § 35.105, the Department has not adopted this suggestion.

The requirement for designation of an employee responsible for coordination of efforts to carry out responsibilities under this part is derived from the HEW regulation implementing section 504 in federally assisted programs. The requirement for designation of a particular

employee and dissemination of information about how to locate that employee helps to ensure that individuals dealing with large agencies are able to easily find a responsible person who is familiar with the requirements of the Act and this part and can communicate those requirements to other individuals in the agency who may be unaware of their responsibilities. This paragraph in no way limits a public entity's obligation to ensure that all of its employees comply with the requirements of this part, but it ensures that any failure by individual employees can be promptly corrected by the designated employee.

Section 35.107(b) requires public entities with 50 or more employees to establish grievance procedures for resolving complaints of violations of this part. Similar requirements are found in the section 504 regulations for federally assisted programs (see, e.g., 45 CFR 84.7(b)). The rule, like the regulations for federally assisted programs, provides for investigation and resolution of complaints by a Federal enforcement agency. It is the view of the Department that public entities subject to this part should be required to establish a mechanism for resolution of complaints at the local level without requiring the complainant to resort to the Federal complaint procedures established under subpart F. Complainants would not, however, be required to exhaust the public entity's grievance procedures before filing a complaint under subpart F. Delay in filing the complaint at the Federal level caused by pursuit of the remedies available under the grievance procedure would generally be considered good cause for extending the time allowed for filing under § 35.170(b).

Subpart B—General Requirements

Section 35.130 General Prohibitions Against Discrimination

The general prohibitions against discrimination in the rule are generally based on the prohibitions in existing regulations implementing section 504 and, therefore, are already familiar

to State and local entities covered by section 504. In addition, § 35.130 includes a number of provisions derived from title III of the Act that are implicit to a certain degree in the requirements of regulations implementing section 504.

Several commenters suggested that this part should include the section of the proposed title III regulation that implemented section 309 of the Act, which requires that courses and examinations related to applications, licensing, certification, or credentialing be provided in an accessible place and manner or that alternative accessible arrangements be made. The Department has not adopted this suggestion. The requirements of this part, including the general prohibitions of discrimination in this section, the program access requirements of subpart D, and the communications requirements of subpart E, apply to courses and examinations provided by public entities. The Department considers these requirements to be sufficient to ensure that courses and examinations administered by public entities meet the requirements of section 309. For example, a public entity offering an examination must ensure that modifications of policies, practices, or procedures or the provision of auxiliary aids and services furnish the individual with a disability an equal opportunity to demonstrate his or her knowledge or ability. Also, any examination specially designed for individuals with disabilities must be offered as often and in as timely a manner as are other examinations. Further, under this part, courses and examinations must be offered in the most integrated setting appropriate. The analysis of § 35.130(d) is relevant to this determination.

A number of commenters asked that the regulation be amended to require training of law enforcement personnel to recognize the difference between criminal activity and the effects of seizures or other disabilities such as mental retardation, cerebral palsy, traumatic brain injury, mental illness, or deafness. Several disabled commenters gave

personal statements about the abuse they had received at the hands of law enforcement personnel. Two organizations that commented cited the Judiciary report at 50 as authority to require law enforcement training.

The Department has not added such a training requirement to the regulation. Discriminatory arrests and brutal treatment are already unlawful police activities. The general regulatory obligation to modify policies, practices, or procedures requires law enforcement to make changes in policies that result in discriminatory arrests or abuse of individuals with disabilities. Under this section law enforcement personnel would be required to make appropriate efforts to determine whether perceived strange or disruptive behavior or unconsciousness is the result of a disability. The Department notes that a number of States have attempted to address the problem of arresting disabled persons for noncriminal conduct resulting from their disability through adoption of the Uniform Duties to Disabled Persons Act, and encourages other jurisdictions to consider that approach.

Paragraph (a) restates the nondiscrimination mandate of section 202 of the ADA. The remaining paragraphs in § 35.130 establish the general principles for analyzing whether any particular action of the public entity violates this mandate.

Paragraph (b) prohibits overt denials of equal treatment of individuals with disabilities. A public entity may not refuse to provide an individual with a disability with an equal opportunity to participate in or benefit from its program simply because the person has a disability.

Paragraph (b)(1)(i) provides that it is discriminatory to deny a person with a disability the right to participate in or benefit from the aid, benefit, or service provided by a public entity. Paragraph (b)(1)(ii) provides that the aids, benefits, and services provided to persons with disabilities must be equal to

those provided to others, and paragraph (b)(1)(iii) requires that the aids, benefits, or services provided to individuals with disabilities must be as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as those provided to others. These paragraphs are taken from the regulations implementing section 504 and simply restate principles long established under section 504.

Paragraph (b)(1)(iv) permits the public entity to develop separate or different aids, benefits, or services when necessary to provide individuals with disabilities with an equal opportunity to participate in or benefit from the public entity's programs or activities, but only when necessary to ensure that the aids, benefits, or services are as effective as those provided to others. Paragraph (b)(1)(iv) must be read in conjunction with paragraphs (b)(2), (d), and (e). Even when separate or different aids, benefits, or services would be more effective, paragraph (b)(2) provides that a qualified individual with a disability still has the right to choose to participate in the program that is not designed to accommodate individuals with disabilities. Paragraph (d) requires that a public entity administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.

Paragraph (b)(2) specifies that, notwithstanding the existence of separate or different programs or activities provided in accordance with this section, an individual with a disability shall not be denied the opportunity to participate in such programs or activities that are not separate or different. Paragraph (e), which is derived from section 501(d) of the Americans with Disabilities Act, states that nothing in this part shall be construed to require an individual with a disability to accept an accommodation, aid, service, opportunity, or benefit that he or she chooses not to accept.

Taken together, these provisions are intended to prohibit exclusion and segregation of individuals with disabilities and the denial of equal opportunities enjoyed by others, based on, among other things, presumptions, patronizing attitudes, fears, and stereotypes about individuals with disabilities. Consistent with these standards, public entities are required to ensure that their actions are based on facts applicable to individuals and not on presumptions as to what a class of individuals with disabilities can or cannot do.

Integration is fundamental to the purposes of the Americans with Disabilities Act. Provision of segregated accommodations and services relegates persons with disabilities to second-class status. For example, it would be a violation of this provision to require persons with disabilities to eat in the back room of a government cafeteria or to refuse to allow a person with a disability the full use of recreation or exercise facilities because of stereotypes about the person's ability to participate.

Many commenters objected to proposed paragraphs (b)(1)(iv) and (d) as allowing continued segregation of individuals with disabilities. The Department recognizes that promoting integration of individuals with disabilities into the mainstream of society is an important objective of the ADA and agrees that, in most instances, separate programs for individuals with disabilities will not be permitted. Nevertheless, section 504 does permit separate programs in limited circumstances, and Congress clearly intended the regulations issued under title II to adopt the standards of section 504. Furthermore, Congress included authority for separate programs in the specific requirements of title III of the Act. Section 302(b)(1)(A)(iii) of the Act provides for separate benefits in language similar to that in § 35.130(b)(1)(iv), and section 302(b)(1)(B) includes the same requirement for "the most integrated setting appropriate" as in § 35.130(d).

Even when separate programs are permitted, individuals with disabilities cannot be denied the opportunity to participate in programs that are not separate or different. This is an important and overarching principle of the Americans with Disabilities Act. Separate, special, or different programs that are designed to provide a benefit to persons with disabilities cannot be used to restrict the participation of persons with disabilities in general, integrated activities.

For example, a person who is blind may wish to decline participating in a special museum tour that allows persons to touch sculptures in an exhibit and instead tour the exhibit at his or her own pace with the museum's recorded tour. It is not the intent of this section to require the person who is blind to avail himself or herself of the special tour. Modified participation for persons with disabilities must be a choice, not a requirement.

In addition, it would not be a violation of this section for a public entity to offer recreational programs specially designed for children with mobility impairments. However, it would be a violation of this section if the entity then excluded these children from other recreational services for which they are qualified to participate when these services are made available to nondisabled children, or if the entity required children with disabilities to attend only designated programs.

Many commenters asked that the Department clarify a public entity's obligations within the integrated program when it offers a separate program but an individual with a disability chooses not to participate in the separate program. It is impossible to make a blanket statement as to what level of auxiliary aids or modifications would be required in the integrated program. Rather, each situation must be assessed individually. The starting point is to question whether the separate program is in fact necessary or appropriate for the

individual. Assuming the separate program would be appropriate for a particular individual, the extent to which that individual must be provided with modifications in the integrated program will depend not only on what the individual needs but also on the limitations and defenses of this part. For example, it may constitute an undue burden for a public accommodation, which provides a full-time interpreter in its special guided tour for individuals with hearing impairments, to hire an additional interpreter for those individuals who choose to attend the integrated program. The Department cannot identify categorically the level of assistance or aid required in the integrated program.

Paragraph (b)(1)(v) provides that a public entity may not aid or perpetuate discrimination against a qualified individual with a disability by providing significant assistance to an agency, organization, or person that discriminates on the basis of disability in providing any aid, benefit, or service to beneficiaries of the public entity's program. This paragraph is taken from the regulations implementing section 504 for federally assisted programs.

Paragraph (b)(1)(vi) prohibits the public entity from denying a qualified individual with a disability the opportunity to participate as a member of a planning or advisory board.

Paragraph (b)(1)(vii) prohibits the public entity from limiting a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving any aid, benefit, or service.

Paragraph (b)(3) prohibits the public entity from utilizing criteria or methods of administration that deny individuals with disabilities access to the public entity's services, programs, and activities or that perpetuate the discrimination of another public entity, if both public entities are subject to common administrative control or are agencies of the same State. The

phrase "criteria or methods of administration" refers to official written policies of the public entity and to the actual practices of the public entity. This paragraph prohibits both blatantly exclusionary policies or practices and nonessential policies and practices that are neutral on their face, but deny individuals with disabilities an effective opportunity to participate. This standard is consistent with the interpretation of section 504 by the U.S. Supreme Court in Alexander v. Choate, 469 U.S. 287 (1985). The Court in Choate explained that members of Congress made numerous statements during passage of section 504 regarding eliminating architectural barriers, providing access to transportation, and eliminating discriminatory effects of job qualification procedures. The Court then noted: "These statements would ring hollow if the resulting legislation could not rectify the harms resulting from action that discrimina[illegible]d by effect as well as by design." Id. at 297 (footnote omitte[illegible]).

Paragraph (b)(4) specifically applies the prohibition enunciated in § 35.130(b)(3) to the process of selecting sites for construction of new facilities or selecting existing facilities to be used by the public entity. Paragraph (b)(4) does not apply to construction of additional buildings at an existing site.

Paragraph (b)(5) prohibits the public entity, in the selection of procurement contractors, from using criteria that subject qualified individuals with disabilities to discrimination on the basis of disability.

Paragraph (b)(6) prohibits the public entity from discriminating against qualified individuals with disabilities on the basis of disability in the granting of licenses or certification. A person is a "qualified individual with a disability" with respect to licensing or certification if he or she can meet the essential eligibility requirements for receiving the license or certification (see § 35.104).

A number of commenters were troubled by the phrase "essential eligibility requirements" as applied to State licensing requirements, especially those for health care professions. Because of the variety of types of programs to which the definition of "qualified individual with a disability" applies, it is not possible to use more specific language in the definition. The phrase "essential eligibility requirements," however, is taken from the definitions in the regulations implementing section 504, so caselaw under section 504 will be applicable to its interpretation. In Southeastern Community College v. Davis, 442 U.S. 397, for example, the Supreme Court held that section 504 does not require an institution to "lower or effect substantial modifications of standards to accommodate a handicapped person," 442 U.S. at 413, and that the school had established that the plaintiff was not "qualified" because she was not able to "serve the nursing profession in all customary ways," id. Whether a particular requirement is "essential" will, of course, depend on the facts of the particular case.

In addition, the public entity may not establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with disabilities to discrimination on the basis of disability. For example, the public entity must comply with this requirement when establishing safety standards for the operations of licensees. In that case the public entity must ensure that standards that it promulgates do not discriminate against the employment of qualified individuals with disabilities in an impermissible manner.

Paragraph (b)(6) does not extend the requirements of the Act or this part directly to the programs or activities of licensees or certified entities themselves. The programs or activities of licensees or certified entities are not themselves programs or activities of the public entity merely by virtue of the license or certificate.

Paragraph (b)(7) is a specific application of the requirement under the general prohibitions of discrimination that public entities make reasonable modifications in policies, practices, or procedures where necessary to avoid discrimination on the basis of disability. Section 302(b)(2)(A)(ii) of the ADA sets out this requirement specifically for public accommodations covered by title III of the Act, and the House Judiciary Committee Report directs the Attorney General to include those specific requirements in the title II regulation to the extent that they do not conflict with the regulations implementing section 504. Judiciary report at 52.

Paragraph (b)(8), a new paragraph not contained in the proposed rule, prohibits the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered. This prohibition is also a specific application of the general prohibitions of discrimination and is based on section 302(b)(2)(A)(i) of the ADA. It prohibits overt denials of equal treatment of individuals with disabilities, or establishment of exclusive or segregative criteria that would bar individuals with disabilities from participation in services, benefits, or activities.

Paragraph (b)(8) also prohibits policies that unnecessarily impose requirements or burdens on individuals with disabilities that are not placed on others. For example, public entities may not require that a qualified individual with a disability be accompanied by an attendant. A public entity is not, however, required to provide attendant care, or assistance in toileting, eating, or dressing to individuals with disabilities, except in special circumstances, such as where the individual is an inmate of a custodial or correctional institution.

In addition, paragraph (b)(8) prohibits the imposition of criteria that "tend to" screen out an individual with a disability. This concept, which is derived from current regulations under section 504 (see, e.g., 45 CFR 84.13), makes it discriminatory to impose policies or criteria that, while not creating a direct bar to individuals with disabilities, indirectly prevent or limit their ability to participate. For example, requiring presentation of a driver's license as the sole means of identification for purposes of paying by check would violate this section in situations where, for example, individuals with severe vision impairments or developmental disabilities or epilepsy are ineligible to receive a driver's license and the use of an alternative means of identification, such as another photo I.D. or credit card, is feasible.

A public entity may, however, impose neutral rules and criteria that screen out, or tend to screen out, individuals with disabilities if the criteria are necessary for the safe operation of the program in question. Examples of safety qualifications that would be justifiable in appropriate circumstances would include eligibility requirements for drivers' licenses, or a requirement that all participants in a recreational rafting expedition be able to meet a necessary level of swimming proficiency. Safety requirements must be based on actual risks and not on speculation, stereotypes, or generalizations about individuals with disabilities.

Paragraph (c) provides that nothing in this part prohibits a public entity from providing benefits, services, or advantages to individuals with disabilities, or to a particular class of individuals with disabilities, beyond those required by this part. It is derived from a provision in the section 504 regulations that permits programs conducted pursuant to Federal statute or Executive order that are designed to benefit only individuals with disabilities or a given class of individuals with disabilities to be limited to those individuals with disabilities. Section 504

ensures that federally assisted programs are made available to all individuals, without regard to disabilities, unless the Federal program under which the assistance is provided is specifically limited to individuals with disabilities or a particular class of individuals with disabilities. Because coverage under this part is not limited to federally assisted programs, paragraph (c) has been revised to clarify that State and local governments may provide special benefits, beyond those required by the nondiscrimination requirements of this part, that are limited to individuals with disabilities or a particular class of individuals with disabilities, without thereby incurring additional obligations to persons without disabilities or to other classes of individuals with disabilities.

Paragraphs (d) and (e), previously referred to in the discussion of paragraph (b)(1)(iv), provide that the public entity must administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities, i.e., in a setting that enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible, and that persons with disabilities must be provided the option of declining to accept a particular accommodation.

Some commenters expressed concern that § 35.130(e), which states that nothing in the rule requires an individual with a disability to accept special accommodations and services provided under the ADA, could be interpreted to allow guardians of infants or older people with disabilities to refuse medical treatment for their wards. Section 35.130(e) has been revised to make it clear that paragraph (e) is inapplicable to the concern of the commenters. A new paragraph (e)(2) has been added stating that nothing in the regulation authorizes the representative or guardian of an individual with a disability to decline food, water, medical treatment, or medical services for that individual. New paragraph (e) clarifies that neither the

ADA nor the regulation alters current Federal law ensuring the rights of incompetent individuals with disabilities to receive food, water, and medical treatment. See, e.g., Child Abuse Amendments of 1984 (42 U.S.C. 5106a(b)(10), 5106g(10)); Rehabilitation Act of 1973, as amended (29 U.S.C. 794); the Developmentally Disabled Assistance and Bill of Rights Act (42 U.S.C. 6042).

Sections 35.130(e) (1) and (2) are based on section 501(d) of the ADA. Section 501(d) was designed to clarify that nothing in the ADA requires individuals with disabilities to accept special accommodations and services for individuals with disabilities that may segregate them:

The Committee added this section [501(d)] to clarify that nothing in the ADA is intended to permit discriminatory treatment on the basis of disability, even when such treatment is rendered under the guise of providing an accommodation, service, aid or benefit to the individual with disability. For example, a blind individual may choose not to avail himself or herself of the right to go to the front of a line, even if a particular public accommodation has chosen to offer such a modification of a policy for blind individuals. Or, a blind individual may choose to decline to participate in a special museum tour that allows persons to touch sculptures in an exhibit and instead tour the exhibits at his or her own pace with the museum's recorded tour.

Judiciary report at 71-72. The Act is not to be construed to mean that an individual with disabilities must accept special accommodations and services for individuals with disabilities when that individual can participate in the regular services already offered. Because medical treatment, including treatment for particular conditions, is not a special accommodation or service for individuals with disabilities under section 501(d), neither the Act nor this part provides

affirmative authority to suspend such treatment. Section 501(d) is intended to clarify that the Act is not designed to foster discrimination through mandatory acceptance of special services when other alternatives are provided; this concern does not reach to the provision of medical treatment for the disabling condition itself.

Paragraph (f) provides that a public entity may not place a surcharge on a particular individual with a disability, or any group of individuals with disabilities, to cover any costs of measures required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part. Such measures may include the provision of auxiliary aids or of modifications required to provide program accessibility.

Several commenters asked for clarification that the costs of interpreter services may not be assessed as an element of "court costs." The Department has already recognized that imposition of the cost of courtroom interpreter services is impermissible under section 504. The preamble to the Department's section 504 regulation for its federally assisted programs states that where a court system has an obligation to provide qualified interpreters, "it has the corresponding responsibility to pay for the services of the interpreters." (45 FR 37630 (June 3, 1980)). Accordingly, recouping the costs of interpreter services by assessing them as part of court costs would also be prohibited.

Paragraph (g), which prohibits discrimination on the basis of an individual's or entity's known relationship or association with an individual with a disability, is based on sections 102(b)(4) and 302(b)(1)(E) of the ADA. This paragraph was not contained in the proposed rule. The individuals covered under this paragraph are any individuals who are discriminated against because of their known association with an individual with a disability. For example, it would be a violation of this

paragraph for a local government to refuse to allow a theater company to use a school auditorium on the grounds that the company had recently performed for an audience of individuals with HIV disease.

This protection is not limited to those who have a familial relationship with the individual who has a disability. Congress considered, and rejected, amendments that would have limited the scope of this provision to specific associations and relationships. Therefore, if a public entity refuses admission to a person with cerebral palsy and his or her companions, the companions have an independent right of action under the ADA and this section.

During the legislative process, the term "entity" was added to section 302(b)(1)(E) to clarify that the scope of the provision is intended to encompass not only persons who have a known association with a person with a disability, but also entities that provide services to or are otherwise associated with such individuals. This provision was intended to ensure that entities such as health care providers, employees of social service agencies, and others who provide professional services to persons with disabilities are not subjected to discrimination because of their professional association with persons with disabilities.

Section 35.131 Illegal Use of Drugs

Section 35.131 effectuates section 510 of the ADA, which clarifies the Act's application to people who use drugs illegally. Paragraph (a) provides that this part does not prohibit discrimination based on an individual's current illegal use of drugs.

The Act and the regulation distinguish between illegal use of drugs and the legal use of substances, whether or not those substances are "controlled substances," as defined in the

Controlled Substances Act (21 U.S.C. 812). Some controlled substances are prescription drugs that have legitimate medical uses. Section 35.131 does not affect use of controlled substances pursuant to a valid prescription under supervision by a licensed health care professional, or other use that is authorized by the Controlled Substances Act or any other provision of Federal law. It does apply to illegal use of those substances, as well as to illegal use of controlled substances that are not prescription drugs. The key question is whether the individual's use of the substance is illegal, not whether the substance has recognized legal uses. Alcohol is not a controlled substance, so use of alcohol is not addressed by § 35.131 (although alcoholics are individuals with disabilities, subject to the protections of the statute).

A distinction is also made between the use of a substance and the status of being addicted to that substance. Addiction is a disability, and addicts are individuals with disabilities protected by the Act. The protection, however, does not extend to actions based on the illegal use of the substance. In other words, an addict cannot use the fact of his or her addiction as a defense to an action based on illegal use of drugs. This distinction is not artificial. Congress intended to deny protection to people who engage in the illegal use of drugs, whether or not they are addicted, but to provide protection to addicts so long as they are not currently using drugs.

A third distinction is the difficult one between current use and former use. The definition of "current illegal use of drugs" in § 35.104, which is based on the report of the Conference Committee, H.R. Conf. Rep. No. 596, 101st Cong., 2d Sess. 64 (1990) (hereinafter "Conference report"), is "illegal use of drugs that occurred recently enough to justify a reasonable belief that a person's drug use is current or that continuing use is a real and ongoing problem."

Paragraph (a)(2)(i) specifies that an individual who has successfully completed a supervised drug rehabilitation program or has otherwise been rehabilitated successfully and who is not engaging in current illegal use of drugs is protected. Paragraph (a)(2)(ii) clarifies that an individual who is currently participating in a supervised rehabilitation program and is not engaging in current illegal use of drugs is protected. Paragraph (a)(2)(iii) provides that a person who is erroneously regarded as engaging in current illegal use of drugs, but who is not engaging in such use, is protected.

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Section 35.171 Acceptance of Complaints

Section 35.171 establishes procedures for determining jurisdiction and responsibility for processing complaints against public entities. The final rule provides complainants an opportunity to file with the Federal funding agency of their choice. If that agency does not have jurisdiction under section 504, however, and is not the agency designated under subpart G as responsible for that public entity, the agency must refer the complaint to the Department of Justice, which will be responsible for referring it either to an agency that does have jurisdiction under section 504 or to the appropriate designated agency, or in the case of an employment complaint that is also subject to title I of the Act, to the Equal Employment Opportunity Commission.

Whenever an agency receives a complaint over which it has jurisdiction under section 504, it will process the complaint under its section 504 procedures. When the agency designated under subpart G receives a complaint for which it does not have jurisdiction under section 504, it will treat the complaint as an ADA complaint under the procedures established in this subpart.

Section 35.171 also describes agency responsibilities for the processing of employment complaints. As described in connection with § 35.140, additional procedures regarding the coordination of employment complaints will be established in a coordination regulation issued by DOJ and EEOC. Agencies with jurisdiction under section 504 for complaints alleging employment discrimination also covered by title I will follow the procedures established by the coordination regulation for those complaints. Complaints covered by title I but not section 504 will be referred to the EEOC, and complaints covered by this part but not title I will be processed under the procedures in this part.

Section 35.172 Resolution of Complaints

Section 35.172 requires the designated agency to either resolve the complaint or issue to the complainant and the public entity a Letter of Findings containing findings of fact and conclusions of law and a description of a remedy for each violation found.

The Act requires the Department of Justice to establish administrative procedures for resolution of complaints, but does not require complainants to exhaust these administrative remedies. The Committee Reports make clear that Congress intended to provide a private right of action with the full panoply of remedies for individual victims of discrimination. Because the Act does not require exhaustion of administrative remedies, the complainant may elect to proceed with a private suit at any time.

Section 35.173 Voluntary Compliance Agreements

Section 35.173 requires the agency to attempt to resolve all complaints in which it finds noncompliance through voluntary compliance agreements enforceable by the Attorney General.

Section 35.174 Referral

Section 35.174 provides for referral of the matter to the Department of Justice if the agency is unable to obtain voluntary compliance.

Section 35.175 Attorney's Fees

Section 35.175 states that courts are authorized to award attorneys fees, including litigation expenses and costs, as provided in section 505 of the Act. Litigation expenses include items such as expert witness fees, travel expenses, etc. The Judiciary Committee Report specifies that such items are included under the rubric of "attorneys fees" and not "costs" so that such expenses will be assessed against a plaintiff only under the standard set forth in Christiansburg Garment Co. v. Equal Employment Opportunity Commission, 434 U.S. 412 (1978). (Judiciary report at 73.)

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CODE OF FEDERAL REGULATIONS
TITLE 28—JUDICIAL ADMINISTRATION
CHAPTER I—DEPARTMENT OF JUSTICE
PART 35—NONDISCRIMINATION ON THE BASIS OF DISABILITY IN STATE AND LOCAL GOVERNMENT SERVICES
SUBPART A—GENERAL

Current through October 1, 1999; 64 FR 53565

§ 35.102 Application.

(a) Except as provided in paragraph (b) of this section, this part applies to all services, programs, and activities provided or made available by public entities.

(b) To the Extent that public transportation services, programs, and activities of public entities are covered by subtitle B of title II of the ADA (42 U.S.C. 12141), they are not subject to the requirements of this part.

* * * *

§ 35.104 Definitions.

For purposes of this part, the term—

Act means the Americans with Disabilities Act (Pub. L. 101-336, 104 Stat. 42 U.S.C. 12101-12213 and 47 U.S.C. 225 and 611).

Assistant Attorney General means the Assistant Attorney General, Civil Rights Division, United States Department of Justice.

Auxiliary aids and services includes—

(1) Qualified interpreters, notetakers, transcription services, written materials, telephone handset amplifiers, assistive listening devices, assistive listening systems, telephones compatible with hearing aids, closed caption decoders, open and closed captioning, telecommunications

devices for deaf persons (TDD's), videotext displays, or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

(2) Qualified readers, taped texts, audio recordings, Brailled materials, large print materials, or other effective methods of making visually delivered materials available to individuals with visual impairments;

(3) Acquisition or modification of equipment or devices; and

(4) Other similar services and actions.

Complete complaint means a written statement that contains the complainant's name and address and describes the public entity's alleged discriminatory action in sufficient detail to inform the agency of the nature and date of the alleged violation of this part. It shall be signed by the complainant or by someone authorized to do so on his or her behalf. Complaints filed on behalf of classes or third parties shall describe or identify (by name, if possible) the alleged victims of discrimination.

Current illegal use of drugs means illegal use of drugs that occurred recently enough to justify a reasonable belief that a person's drug use is current or that continuing use is a real and ongoing problem.

Designated agency means the Federal agency designated under subpart G of this part to oversee compliance activities under this part for particular components of State and local governments.

Disability means, with respect to an individual, a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment.

(1)(i) The phrase physical or mental impairment means—

(A) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine;

(B) Any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(ii) The phrase physical or mental impairment includes, but is not limited to, such contagious and noncontagious diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, HIV disease (whether symptomatic or asymptomatic), tuberculosis, drug addiction, and alcoholism.

(iii) The phrase physical or mental impairment does not include homosexuality or bisexuality.

(2) The phrase major life activities means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(3) The phrase has a record of such an impairment means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(4) The phrase is regarded as having an impairment means—

(i) Has a physical or mental impairment that does not substantially limit major life activities but that is treated by a public entity as constituting such a limitation;

(ii) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(iii) Has none of the impairments defined in paragraph (1) of this definition but is treated by a public entity as having such an impairment.

(5) The term disability does not include--

(i) Transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;

(ii) Compulsive gambling, kleptomania, or pyromania; or

(iii) Psychoactive substance use disorders resulting from current illegal use of drugs.

Drug means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act (21 U.S.C. 812). Facility means all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located.

Historic preservation programs means programs conducted by a public entity that have preservation of historic properties as a primary purpose.

Historic Properties means those properties that are listed or eligible for listing in the National Register of Historic Places or properties designated as historic under State or local law.

Illegal use of drugs means the use of one or more drugs, the possession or distribution of which is unlawful under the Controlled Substances Act (21 U.S.C. 812). The term illegal use of drugs does not include the use of a drug taken under

supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

Individual with a disability means a person who has a disability. The term individual with a disability does not include an individual who is currently engaging in the illegal use of drugs, when the public entity acts on the basis of such use.

Public entity means—

(1) Any State or local government;

(2) Any department, agency, special purpose district, or other instrumentality of a State or States or local government; and

(3) The National Railroad Passenger Corporation, and any commuter authority (as defined in section 103(8) of the Rail Passenger Service Act).

Qualified individual with a disability means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

Qualified interpreter means an interpreter who is able to interpret effectively, accurately, and impartially both receptively and expressively, using any necessary specialized vocabulary.

Section 504 means section 504 of the Rehabilitation Act of 1973 (Pub. L. 93-112, 87 Stat. 394 (29 U.S.C. 794)), as amended.

State means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

CODE OF FEDERAL REGULATIONS
TITLE 28—JUDICIAL ADMINISTRATION
CHAPTER I—DEPARTMENT OF JUSTICE
PART 35—NONDISCRIMINATION ON THE BASIS OF DISABILITY IN STATE AND LOCAL GOVERNMENT SERVICES
SUBPART B—GENERAL REQUIREMENTS

Current through October 1, 1999; 64 FR 53565

§ 35.130 General prohibitions against discrimination.

(a) No qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.

(b)(1) A public entity, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability—

(i) Deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(iv) Provide different or separate aids, benefits, or services to individuals with disabilities or to any class of individuals with disabilities than is provided to others unless such action is necessary to provide qualified individuals with disabilities with

aids, benefits, or services that are as effective as those provided to others;

(v) Aid or perpetuate discrimination against a qualified individual with a disability by providing significant assistance to an agency, organization, or person that discriminates on the basis of disability in providing any aid, benefit, or service to beneficiaries of the public entity's program;

(vi) Deny a qualified individual with a disability the opportunity to participate as a member of planning or advisory boards;

(vii) Otherwise limit a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

(2) A public entity may not deny a qualified individual with a disability the opportunity to participate in services, programs, or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities.

(3) A public entity may not, directly or through contractual or other arrangements, utilize criteria or methods of administration:

(i) That have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability;

(ii) That have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity's program with respect to individuals with disabilities; or

(iii) That perpetuate the discrimination of another public entity if both public entities are subject to common administrative control or are agencies of the same State.

(4) A public entity may not, in determining the site or location of a facility, make selections—

(i) That have the effect of excluding individuals with disabilities from, denying them the benefits of, or otherwise subjecting them to discrimination; or

(ii) That have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the service, program, or activity with respect to individuals with disabilities.

(5) A public entity, in the selection of procurement contractors, may not use criteria that subject qualified individuals with disabilities to discrimination on the basis of disability.

(6) A public entity may not administer a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability, nor may a public entity establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with disabilities to discrimination on the basis of disability. The programs or activities of entities that are licensed or certified by a public entity are not, themselves, covered by this part.

(7) A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

(8) A public entity shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity,

unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered.

(c) Nothing in this part prohibits a public entity from providing benefits, services, or advantages to individuals with disabilities, or to a particular class of individuals with disabilities beyond those required by this part.

(d) A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.

(e)(1) Nothing in this part shall be construed to require an individual with a disability to accept an accommodation, aid, service, opportunity, or benefit provided under the ADA or this part which such individual chooses not to accept.

(2) Nothing in the Act or this part authorizes the representative or guardian of an individual with a disability to decline food, water, medical treatment, or medical services for that individual.

(f) A public entity may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part.

(g) A public entity shall not exclude or otherwise deny equal services, programs, or activities to an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association.

CODE OF FEDERAL REGULATIONS
TITLE 28—JUDICIAL ADMINISTRATION
CHAPTER I—DEPARTMENT OF JUSTICE
PART 35--NONDISCRIMINATION ON THE BASIS OF DISABILITY IN STATE AND LOCAL GOVERNMENT SERVICES
SUBPART F—COMPLIANCE PROCEDURES

Current through October 1, 1999; 64 FR 53565

§ 35.172 Resolution of complaints.

(a) The designated agency shall investigate each complete complaint, attempt, informal resolution, and, if resolution is not achieved, issue to the complainant and the public entity a Letter of Findings that shall include—

(1) Findings of fact and conclusions of law:

(2) A description of a remedy for each violation found; and

(3) Notice of the rights available under paragraph (b) of this section.

(b) If the designated agency finds noncompliance, the procedures i §§ 35.173 and 35.174 shall be followed. At any time, the complainant may file a private suit pursuant to section 203 of the Act whether or not the designated agency finds a violation.

* * * *

§ 35.175 Attorney's fees.

In any action or administrative proceeding commenced pursuant to the Act or this part, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs, and the United States shall be liable for the foregoing the same as a private individual.

APPENDIX E

IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY

C-92-04223 OT

Darwin Green, by his mother Theresa Henson, et al.
Plaintiffs

vs.

North Arundel Hospital, et al.
Defendants

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION IN LIMINE TO EXCLUDE THE PRESENCE OF DARWIN GREEN FROM THE COURTROOM TRIAL

Now come Plaintiffs by and through counsel, Scott E. Nevin, Suzanne C. Shapiro and Saul E. Kerpelman, and for good cause state as follows:

1. Defendants' request to have the party Plaintiff, Darwin Green, prohibited from attending his own trial, a trial that will determine his future, is not supported by fact, is not grounded in law, and is frank, blatant discrimination against a disabled person.

2. The Defendants baldy assert in their motion that Darwin Green cannot consciously function. Furthermore, Defendants baldly assert that Darwin Green requires extensive medical equipment to make his attendance possible. Specifically, Defendants state, without legally required support, that Darwin Green requires an ambu bag to breathe and his airway must continually be suctioned to remove any fluid which could impair his respiration. In addition, Defendants

assert that this equipment produces sight and sounds inappropriate during trial. Finally, Defendants wildly assert, based on a stereotypical assumption, that Darwin's presence would create a spectacle, "a prejudicial side-show", thereby distracting and prejudicing the jurors.

Defendants offer no medical testimony by affidavit or otherwise in support of these misleading statements. To the contrary, Plaintiffs' counsel has spoken to Darwin Green's medical provider who clearly indicates that Darwin Green does not require an ambu bag to breath. Darwin Green's health care provider indicates that Darwin Green's presence in Court for a short duration will not be disruptive or produce sights and sounds inappropriate during trial.

Finally, Defendants offer no medical testimony in support of their assertion that Darwin Green cannot consciously function. To the contrary, Darwin Green's mother, Teresa Henson, indicates that Darwin is responsive to her presence. Without proper support by affidavit, Defendants' statement that Darwin Green has no level of consciousness is a bald allegation that cannot justify banning Darwin Green from attendance at this own trial.

3. Defendants rely on the Maryland Appellate case *Gorman v. Sabo* 210 Md. 155 (1956) in support of their proposition that Darwin must be banned from the Courtroom. In that case, the party defendant, Mrs. Gorman, was unable, on her own accord, to be present throughout the entire trial. The trial court refused to grant a continuance of the trial and continued without Mrs. Gorman present. The Appellate Court held that because she did not claim, much less show, any prejudice to her case by her lack of presence, "the right of a party to a cause of action to be present throughout the trial is not an absolute right in a civil case and in the discretion of the court, with due regard to the circumstances as to prejudice, the

case may be tried or finished when a party, including the Defendant, is absent." *Gorman*, at 167.

Gorman involved a party who voluntarily absented herself from the proceedings, in essence waiving her right to be present at trial. Hence, the court held that without a showing of prejudice to Ms. Gorman, it was not error for the trial to be held in her absence. That is not the case here.

4. In the case *sub judice*, Defendants seek to exclude Darwin Green solely as a result of his physical appearance. However, a party to a civil action should have a reasonable opportunity to attend its trial. In *Helminski v. Ayerst Laboratories*, 766 F.2d 208 (6th Cir. 1985) the 8th U.S. Federal Circuit Court observed that although the Due Process clause of the United States Constitution does not give a civil litigant the absolute right to be present personally during his trial, due process is offended if he is excluded arbitrarily or in the absence of extreme circumstances.[1] The Court wert on to

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[1] Maryland's State Constitution embodies the notion of due process. The Maryland Constitution, Declaration of Rights, Article 5 states in part that "the parties to any civil proceeding in which the right to a jury trial is preserved are entitled to a trial by jury of at least 6 jurors."

Article 19 states "that every man, for any injury done to him in his person or property, ought to have remedy by the course of the law of the land, and ought to have justice and right, freely without sale, fully without any denial, and speedily without delay, according to the law of the land."

This article had been characterized as a guarantee of due process. 63 Op. Atty. Gen. 246 (A 78). "The law of the land" in this article is the same due process of law required by the Fourteenth Amendment to the Constitution of the United States. *In re Easton*, 214 Md. 176 (1957). This article guarantees access to the court. *Johnson v. Maryland State Police*, 331 Md. 285 (1993).

Article 40 states: "that the liberty of the press ought to be inviolably preserved; that every citizen of the state ought to be allowed to speak, write and publish his sentiments on all subjects, being responsible for the abuse of that privilege."

conclude that a Plaintiff's physical appearance alone does not warrant his expulsion. *Id.* at 215.

The ideals behind due process and a fair trial permit a party to be present in the courtroom absent extreme conditions. Moreover, the possibility of juror sympathy alone is not juror prejudice, and is insufficient to exclude a party from the courtroom. *Helminski*, 766 F.2d at 216. The *Helminski* court set out that exclusion of a party is disfavored, and the party seeking exclusion must bear the burden of showing that only through exclusion can a fair trial be obtained. *Helminski*, 766 F.2d at 216. The requisite showing of prejudice cannot be satisfied simply by establishing that a Plaintiff has a physical or mental injury.

The party seeking exclusion must show that the party's appearance or conduct is likely to prevent the jury from performing its duty. *Helminski*, 766 F.2d at 218. The court then holds that even if the party seeking exclusion meets its burden of showing prejudice, consistent with due process, a party still cannot be barred if the party can comprehend the proceedings or aid its attorney in the litigation. *Helminski*, 766 F.2d at 216.

Although Maryland Appellate Courts have not addressed this issue, numerous State and Federal courts have held that a party's physical appearance cannot be the sole basis for exclusion from the courtroom and does not amount to an extreme circumstance permitting exclusion. See *Carey v. Oneok, Inc.*, 940 P. 2d 201 (Okla. 1997) (holding that exclusion

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This article guarantees public access to Court proceedings similar to that guaranteed by the First Amendment to the Constitution of the United States. *Baltimore Sun Co. v. Colbert*, 323 Md. 290 (1991).

Article 24 prohibits depravation of life, liberty, or property other than by judgment of his peers or by law of the land. This article embodies the United States constitutional concept of equal protection. *Renko v. McLean*, 346 Md. 464 (1996).

of a severely burned and disfigured six year old child Plaintiff from the courtroom was improper); *Florida Greyhound Lines, Inc. v. Jones*, 60 So.2d 396 (Fla. 1952) (holding that a party plaintiff on a stretcher, in a weakened, sickened and stupefied condition, attended by a nurse and hospital attendant was entitled to be present at trial, especially when Plaintiff happened to be unsightly from injuries which he was trying to prove the Defendant negligently caused); *Mason v. Moore*, 64 N.Y.S. 2d 195, 226 A.D.2d 993 (1996) (holding that a five year old brain damaged spastic quadriplegic with severe developmental delays and physical disability was entitled to be present at all stages of his trial when the basis for exclusion rested solely on a stereotypical assumption that a party's disability will prejudice the jury); *Marks v. Mobil Oil Corporation*, 562 F. Supp. 759 (E.D. Pa 1983) (holding that a spastic quadriplegic Plaintiff confined to a wheelchair had a right to attend liability phase of personal injury trial, especially when his trial behavior was not disruptive); *Helminski v. Ayerst Laboratories*, 766 F.2d 208 (1985) (holding that testimony indicating that a Plaintiff was not toilet trained, could not speak, comprehend the proceedings, or assist counsel, and sometimes emitted frightening sounds was not sufficient to establish that the jury would be prevented from or substantially impaired in performing its duty).

5. In the case *sub judice* Darwin Green would be severely prejudiced if barred from trial. Darwin Green's attendance at trial is necessary to aid his counsel in establishing elements of liability. In order for a Plaintiff to prove a cause of action in negligence, the Plaintiff must establish the following:

1. That the Defendant was under a duty to protect the Plaintiff from injury.;
2. That the Defendant breached that duty.;

3. *That the Plaintiff suffered actual injury or loss*; and

4. *That the loss or injury proximately resulted from the Defendant's breach of the duty.*

Yonce v. Smithkline Beecham Clinical Laboratories, Inc., 111 Md. App 124 (1996).

As a necessary part of Plaintiffs' liability action, Plaintiffs *must* prove that Darwin Green suffered actual loss proximately resulting from the Defendants' breach of duty. Clearly, Darwin Green's physical condition has a bearing on the question of liability. Plaintiffs allege that Darwin Green's current condition proximately resulted from the Defendants' breach of duty. Consequently, it will be necessary for Plaintiffs' medical expert to explain to the jury, via the best example possible, that Darwin Green's current condition proximately resulted from the Defendants' breach of duty. *See Talcott v. Holl*, 224 So. 2d 420 (Fla. 1969), cert. denied, 232 So. 2d 181 (Fla. 1969) (A brain damaged Plaintiff who alleged that her physicians' negligence resulted in her condition was permitted to be present in court for a few minutes to demonstrate her condition. Specifically, the court permitted an expert witness to demonstrate the Plaintiff's condition by asking her certain questions to show her inability to speak or converse normally, and to request her to attempt certain motions to demonstrate her inability or limitations in such respects.)

In addition, Darwin Green must demonstrate to the jury his current condition in order to establish the "general harm"of which the Defendants should have foreseen. *Yonce v. Smithkline Beecham Clinical Laboratories, Inc.* 111 Md. App. 124 (1996). This element is necessary in order to prove that the Defendants were the legal cause of Darwin Green's injuries. Moreover, allowing the jury to view the potential harm that occurred to Darwin Green is necessary in order for the jury to

establish the standard of care the Defendants were obligated to undertake. Finally, the best evidence to exhibit the injury causally related the Defendants' negligence is Darwin Green himself.

Darwin Green's current physical and mental condition is the very condition he is trying to prove the Defendants negligently caused. Thus, Darwin Green is able to aid his attorneys in presenting his case with regard to establishing vital elements of his claim. To bar Darwin Green from attending trial to demonstrate his condition would prevent his attorneys from approximately establishing the proximate cause element of his liability claim.

6. Furthermore, a jury will generally follow the court's instructions and decide a case based on the law presented. *Helminski v. Ayerst Laboratories*, 766 F.2d 208, 216 (1985). The likelihood of jury sympathy is not the equivalent of prejudice. A juror's sympathetic feeling toward a party does not necessarily lead to the conclusion that the jury will disregard the law to reach a verdict based on sympathy alone. *Carey v. Oneok*, 940 P.2d 201, 205 (Sup. Ct. OK 1997); *Helminski v. Ayerst Laboratories*, 766 F.2d 208, 216 (1985); *Mason v. Moore*, 641 N.Y.S. 2d 195, 196 (1996). In this case, other than relying solely on a stereotypical assumption that Darwin Green's disability will prejudice the jury, the Defendants have made no factual showing that Darwin Green's appearance or conduct is likely to prevent the jury from performing its duty. *See Helminski* at 218. Hence, this Court has no legal authority to bar Darwin Green from the courtroom.

7. Moreover, to exclude Darwin Green from attending his own trial would be a blatant, outright violation of the Americans with Disabilities Act. This law was specifically enacted to prohibit discrimination on the basis of a physical or mental handicap. Section 12132 reads:

> subject to the provisions of this chapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

Title 42 U.S.C. § 12132 (1990)[2]

The Americans with Disabilities Act has been held to apply to the physical surroundings of a Courthouse. *Kroll v. St. Charles County*, 766 F.Supp. 744 (E.D. Mo., 1991). More significantly, a judge who violated the Americans with Disabilities Act by not accommodating a handicapped person who needed special access to a restroom during trial was not immune from liability for this violation. *Livingston v. Guice*, 68 F.3d 460 (4th Cir. 1995).

To bar Darwin Green from trial based on his physical and mental disability is equivalent to frank, blatant discrimination, with complete disregard for the Americans with Disabilities Act. Defendants asking the Court to prohibit Darwin Green from the courtroom is in essence asking the Court to violate this Federal Act.

8. Finally, the Supreme Court of the United States has held that the First and Fourteenth Amendments clearly give the public a right of access to trials themselves, civil as well as criminal. *Richmond Newspapers, Inc. v. Commonwealth of Virginia*, 448 U.S. 555 (1980). See also, *In re Oliver*, 333 U.S. 257 (1948) "Historically and functionally open trials have been closely associated with the development of the fundamental

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[2] Recently, the Supreme Court of Oklahoma stated that case law excluding parties from attending trial based on a physical or mental disability may need re-evaluation in light of the Americans with Disabilities Act. *Carey v. Oneok, Inc.*, 940 P.2d 201, 205 n 5 (Okla. 1997).

procedure of trial by jury." *Richmond*, 448 U.S. 589. "Open trials are bulwarks of our free and democratic government: public access to court proceedings is one of the numerous 'checks and balances' of our system because 'contemporaneous review in the form of public opinions is an effective restraint on possible abuse of judicial power'" *Richmond*, 448 U.S. at 592. Public trial guarantees safeguards against any attempt to employ our courts as instrument of persecution or for the suppression of political or religious heresies. *Id.*

If Darwin Green were not a party to this action, and were merely an observer, he would have every right to public access to the court proceedings under United States constitutional and statutory law, as well as state constitutional law. It follows that Darwin Green has every right to be present in court as a party to this court action, especially in light of the fact that Darwin Green is a necessary aid to his counsel in presenting elements of his liability claim. It is impermissible that he be kept from the courtroom, and kept from aiding his counsel in establishing his claim, solely because of his status as a party who is physically and mentally disabled. Darwin Green has every right to be present at a trial that will profoundly influence the rest of his life.

9. In conclusion, the Defendants have failed to meet their burden of persuasion, other than by asserting discriminatory stereotypes, that Darwin Green's appearance or conduct is likely to prevent the jury from performing its duty. Even so, this court does not have discretion to bar Darwin Green from court, as his presence is necessary to aid his attorneys in presenting his liability claim. Finally, this court lacks authority to bar Darwin Green from the courtroom under the Americans with Disabilities Act, as well as the United States Constitution.

Wherefore, Plaintiffs request this honorable Court to deny the Defendants' Motion in Limine to Exclude Darwin Green from the Courtroom at Trial.

/s/ Scott E. Nevin
Suzanne C. Shapiro, Esquire
Scott E. Nevin, Esquire
Law Office of Saul E. Kerpelman
10 North Calvert Street
Suite 600 The Equitable Building
Baltimore, Maryland 21202
(410) 547-0202

IN THE CIRCUIT COURT
FOR ANNE ARUNDEL COUNTY

C-92-04223 OT

Darwin Green, by his mother Theresa Henson, et al.
Plaintiffs

vs.

North Arundel Hospital, et al.
Defendants

REQUEST FOR HEARING

The Plaintiffs request a hearing.

/s/ Scott E. Nevin

Suzanne C. Shapiro, Esquire
Scott E. Nevin, Esquire
Law Office of Saul E. Kerpelman
10 North Calvert Street
Suite 600 The Equitable Building
Baltimore, Maryland 21202
(410) 547-0202

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APPENDIX F

Excerpts from Trial Court Hearing on Defendants' Motion in Limine to Exclude the Presence of the Party Plaintiff from the Courtroom at Trial Circuit Court for Anne Arundel County, Maryland October 6, 1997

[4]

* * * *

THE COURT: All right. Well, counsel unless there is something in opening, I will hear from you.

MR. KARSTEN: Thank you, Your Honor. Since North Arundel Hospital filed the motion, I think first I will take a first crack at it. This, of course, is the case where you have already bifurcated liability and damages and Darwin Green, the person on behalf of whom this case is being brought by the parents, is a boy whose been described by the Plaintiff's expert, as well as, I think, conceded in the Plaintiffs' answers to interrogatories as being in a chronic vegetated state.

I submitted those things to you on Friday just so [5] that you are clear on that in terms of the additional documentation and the reply, as well as this morning, a file copy on those, both of those admissions and concessions by the Plaintiffs' team, I think. His state, I would anticipate, in court, would be, one, he is, I believe, in a wheelchair primarily, or at least, he would be able to be in a wheelchair under those circumstances. He would have a tracheostomy so he could breath through a hole in his throat.

As far as from time to time, a supplemental oxygen in the form of an ambubag, but primarily it is on – as far a feeding tube, it requires assistance with suctioning and does not communicate to anyone. He may, from time to time, recognize

the voice of his mother from time to time, but beyond that, he does not at all communicate to anyone but alone, his attorneys. As I said before, this was a circumstance where you had bifurcated liability and damages, and we are entering the liability portion of the trial.

In that context, I think the case law that has been cited to you analyzes the proposition of whether a Plaintiff in this circumstance can be excluded from the courtroom. One, there is a due process issue, whether or not the litigants' right to jury trial is – requires his presence. And I think that the courts have uniformly held that that due process issues is limited.

That is to say that especially where a boy like [6] Darwin is not himself, the Plaintiff, but is being – but is here represented by parents in the – and where he is represented by counsel, then the due process considerations are satisfied simply by those things alone. This is not a circumstance where he is disfigured where his appearance is potentially upsetting, but he is otherwise a normal communicating healthy individual.

This is a circumstance where he will not be able to understand the proceedings. He will not be able to communicate with his counsel. He will not have any meaningful participation in that form. I don't think that – the analysis is obviously not to the same during the damages portion of the trial, but the liability stays. The issue then becomes whether his presence will cause prejudice to the defense in front of the jury. And I don't see how you can help but answer that question in this case, but it will.

I think that – as I understand the Plaintiffs' response, it is that, well, we need the presence of Darwin for at least a short period of time to demonstrate his injury and to demonstrate that his injury was caused by these Defendants. I would proffer, Your Honor, that simply is not true. That that is – they will be calling an expert witness, who, I think, will go into issues of

causation of approximate cause. They have already indicated their intent to put in certain medical records which all deal with the extent of injury and [7] possible cause to a certain extent.

And so, from the point of your prima facie case, they don't need to bring Darwin in to establish their case. From the point of view of causation that his condition results from these Defendants' – that is precisely the prejudice to the defense in the circumstance to try to argue that that boy is in that condition only because of what these Defendants did. When you look at that hand in hand with the Plaintiffs' motion in limine to exclude any reference to negligence on the part of the University of Maryland, that entire issue, then you start to see where this is going.

To try to say that Darwin's cardiac arrest on Saturday the 20th of August was inevitable as a result of the discharge of Darwin on the 18th of August, even though he is seen by his pediatrician the next morning. He is seen at University by a neurosurgical team. He is evaluated by the neurosurgical team. They go through their decision-making process, and by the Plaintiffs' own expert admission, they had plenty of time at University to do something about his circumstance.

And so, to try to present Darwin as a prima facie evidence that these Defendants caused his condition is precisely the prejudice and the circumstance. The case law that the Plaintiffs have cited, I think is – what is interesting is that those cases by and large all resulted in [8] exclusion of the plaintiff in those circumstances. The *Helminsky* case, a 19-year old autistic boy, the District Court said that the – that it was – the District Court said in that case, and I believe you got the cite in the papers.

But they said that the court in the federal framework that the court should have evaluated the boy themselves before making the decision to exclude the boy. But that the decision to exclude was not – was harmless error essentially because of

the boy's condition that everybody essentially conceded what his condition was. Here, we provided you with the information about what the boy's condition is in terms of the Plaintiff's own testimony in the answers to interrogatories and in the expert's, Dr. Barthose's, deposition transcript.

We have for Your Honor the '96 and '97 evaluations from Mount Washington that I think back all this up if you would prefer to see that. But let me point out the very interesting thing to me and that is the fact that Darwin is not here this morning. I think that that demonstrates a couple of things. It demonstrates, number one, that contrary to, I think, the representations in the Plaintiffs' response, he is not meaningfully participating in the preparation of this trial or in the conduct of this trial. And he is not here for this hearing or for, I think, tactful reasons from the Plaintiffs' perspective.

[9] And so, looking then at the other cases cited by the Plaintiffs, the *Cassandra* case, which was the other child case where the child was normal mentally but a minor and was spastic and required substantial support. And the court, the California Court of Appeals, said that it was appropriate for that court, for that trial court to exclude that plaintiff from the liability portion of trial.

The *Carrie* case which was Plaintiffs' cite really stands for the proposition that you can't exclude a plaintiff on the basis of looks alone if the plaintiff is able to communicate, if the plaintiff is able to participate, if the plaintiff is able to confer with counsel and amply participate in the trial process, then looks alone is not enough. But that is not this circumstance.

Well, prejudice to these Defendants in the liability portion of the trial comes from the efforts to put on essentially a spectacle and to try to say to the jury, don't worry about the causation issues. Don't worry about the day and a half, the two-

day difference in care. Don't worry about it. That is what resulted from these Defendants. And that is the damages issue.

The obvious impact of the spectacle from the Court's perspective would be that we would have an extended period of time in just dealing with the event of Darwin coming in the room, being in the room, leaving the room, whatever [10] ancillary support he would need in the process. And depending upon what the time period is, it is no question it will be a momentous part of the Plaintiffs' case regardless of whether it is five minutes or five hours and the impression on the jury in that circumstance of something which is truly irrelevant to the liability portion of the case is the prejudice to the Defendant.

THE COURT: Anyone else –

MS. MARCIAL: Your Honor, may I add argument from Dr. Fields and Dr. Axelbaum's perspective?

THE COURT: All right.

MS. MARCIAL: I think there are two reasons for a plaintiff to be present at a trial, and both of those reasons would not apply to Darwin Green in this case. One would be to provide assistance to their counsel, and the second would be able to appreciate the process that was going on as part of their undue process right. It goes without saying, Darwin Green is in a persistent vegetative state. He is functioning at the level of a one month old baby. He has no spontaneous movements whatsoever.

At a deposition of one of Darwin's providers, I was able to visit Darwin at the Mount Washington Hospital. I was within a few feet of Darwin and attempted to engage him on numerous occasions and was not able to. Even though Darwin was in the presence of three other roommates and had a [11] provider also within a few feet of Darwin, he did not engage or interact in any way with anyone in the room. Likewise –

THE COURT: What is the child's age chronologically?

MS. MARCIAL: I think he is 19 or 20 at the present time.

THE COURT: Yes.

MR. KARSTEN: February 2, 1997.

THE COURT: All right.

MS. MARCIAL: I think it is obvious, therefore, Your Honor, that the only reason for the Plaintiffs' desire to bring Darwin into the courtroom is to invoke the jury's sympathy, and this would only prejudice Defendants with liability aspect of the claim. When they get to the damages portion, if and when of the claim, we would have no qualms and obviously no argument about brining Darwin in.

THE COURT: I don't foresee any argument at that stage.

MS. MARCIAL: And we would have none, Your Honor. So it is our position, for the reasons stated in addition to Mr. Karsten's argument, that Darwin be excluded. Thank you.

THE COURT: Anything further from the defense on that motion?

MS. MALONE: Your Honor, just briefly, I would only add that Mr. Karsten spoke of his current situation at the [12] Mount Washington Pediatric Hospital. We do have the record as recently as his '97 evaluation, and he has been found to have severe motor incognant impairment, believed to be functioning presently at a one month level. He does have a tube through which he is breathes and is provided food. The records indicates that he produces copious amounts of fluid –

MR. NEVIN: Your Honor, I would object to the entry of these documents or discussion of these documents at this time. They could have attached it to their motions. They failed to do that, and it appears that she is trying to counteract an argument

by the Plaintiff that they provided -- they have the burden, and they provided no affidavit from any medical professional with regards to his current functioning. And here, now, Ms. Malone is trying to present this to the Court as some type of affidavit or testimony about his current condition. So I would object.

THE COURT: Counsel, I only wish to be enlightened.

MR. NEVIN: I will object.

THE COURT: I am only looking to the facts.

MR. NEVIN: I am objecting to her presenting this at this time.

THE COURT: I don't think she is presenting the records at this time.

MS. MALONE: Your Honor, my only point was to enlighten and to have Your Honor be able to visualize this [13] individual that he does require –

THE COURT: Well, obviously, as I understand the case law, that is exactly what I have to do. That is where the issue lies.

MS. MALONE: Yes, sir.

THE COURT: So –

MS. MALONE: I am attempting to illustrate that when Your Honor is balancing the right of a plaintiff to be present versus the right that he would not have to be present, these things all come into play. So that no doubt, we would have to have a skilled health professional. The secretions that come from his tracheostomy tube has to be suctioned. I am certain that that wouldn't be done in the courtroom, but I think that what Mr. Karsten was trying to convey to Your Honor that it would require at any moment his needing that treatment, he would have to be removed from the courtroom.

He would have to be brought back. He would also have to be fed through the tube, and I think the most telling portion of these records is that Darwin does not communicate beyond what an infant would perhaps respond to a voice or be aware that there were people in the room. But by no means can this individual assist in his – the prosecution of his case or assist his attorneys in any way in presenting evidence and commenting on the evidence. Thank you, Your Honor.

THE COURT: All right.

[14] MR. NEVIN: Thank you, Your Honor, Scott Nevin on behalf of the Plaintiff. On this type of motion – first off, it is interesting that when they filed their motion to bifurcate, they did not join at that time this issue of trying to prevent Darwin from coming to court. And in the case where –

THE COURT: I don't find that particularly interesting, counsel. Maybe if we could get right to the subject matter.

MR. NEVIN: Yes, okay. Well, Your Honor, I think something else I need to point out to you, because the burden is on them to show that the jury cannot do their job. Okay. And that this – that his presence will substantially impair the jury's performance. Okay. But you should understand also that North Arundel Hospital has a direct relationship with Mount Washington Hospital which is where Darwin stays. And so, they had that connection where they could have provided an affidavit or brought in a medical health care provider to you directly to testify as to what a side show, a prejudicial side show, Darwin is going to present.

Well, the truth of the matter, Your Honor, is that it is not. There aren't clanging machines. There isn't loud noises. Darwin doesn't make noises. His feeding tube is not physical. The function is something that only happens while –

[15] THE COURT: Have you brought him here to day, counsel?

MR. NEVIN: His mother is here today, Your Honor, and I have a video tape that was taken a day in the life of Darwin Green –

THE COURT: Right.

MR. NEVIN: – several years ago. It has been provided to counsel. I am almost certain – and you can take a look. I started watching it last night. It shows that the health care providers are talking to him. They are bathing him. They are putting clothes on him. He is not making noises. The sounds, I asked the mother, because she was there in the video, is from another patient either in the room or the room next door.

But he is sitting there, his eyes are moving. He is awake. We don't know if he understands. He functions physically on a one month level, but we don't know, because you have the health care providers there talking to him like a person. They are singing to him. They are clapping hands –

THE COURT: Well, what is the purpose of bringing him here?

MR. NEVIN: The purpose of bringing him, Your Honor –

THE COURT: Is he going to assist in his defense? Is he going sit next to counsel and assist you?

[16] MR. NEVIN: Your Honor, in the liability aspect of a trial, it is necessary that we also prove the damage. And not only that, but that the damage was foreseeable. We are going to have to rely on, as Mr. Karsten may argue, a prima facie case. We can prove our case all the way to the law if we're entitled to, and certainly we are. His condition, as he lives today, is something that is foreseeable for a child with hydrocephalus with a shunt in place, and that shunt may be malfunctioning.

So his presence in presence in court, there is nothing wrong the jury seeing what his condition is and that that is something that is foreseeable. But the thing is that the cases that have been cited by the defense counsel all become before the American Disabilities Act. And the interesting thing in the *Helminsky* case that Mr. Karsten was trying to argue before, that also became before the Judicial Disabilities Act – the American Disabilities Act.

But it is clearly that they have a right to be – there is no right to exclude them unless it is going to impinge – it is going to distract from the jury. And we're not – there is nothing in here or having to deal with Darwin that is going to do that. The burden is also – the standard is that it must be something that, with regards to due process, he has a right to be here. The Court can limit that but only under extraordinary circumstances, and you don't have [17] that here in Darwin's case.

And Mr. Karsten says his presence will cause prejudice. We don't know that. We don't know that this jury will be not able to render a decision based on that. And as we've indicated, he is not going to be sitting here the entire time for trial. We don't want to bring it to a situation where if he would need to have his airway cleaned, that is something that only happens every two hours. We've been informed it is not a noisy process or something. He will have a health care professional with him here in the courtroom.

Going through my notes, the issue what Mr. Karsten argues that his presence here will for some say that he is only here because of what the Defendants did, and they are to ignore what happened at University Hospital. That is Mr. Karsten's argument to the jury at the end of the case. We are showing the whole element and the reason why we are able even to present this case is that a health care provider cannot just wash their

hands by allowing the patient to leave as long as they are walking and what is apparently good physical condition.

That is not the standard under the Maryland law. They failed to diagnose. They failed to catch Darwin's circumstances of a malfunctioning shunt, and they are then – they are responsible for the foreseeable injuries. So, you know, what Mr. Karsten argues that we're trying to ignore what [18] happened at University Hospital is not relevant to the issue in this motion. Mr. Karsten argued about the *Carrie* case. Well, that was a child that was allowed to participate.

But in Carrie – was a child who was born, but the Carrie child was only six years old. Is that person meaningfully participating in the strategy of a trial and helping the lawyers out? I don't think so. Furthermore, it should be mentioned there was a New York case that we cited, *Mason v. Moore.* And in that case it also involved an infant child who had sustained brain damage. And this was a 1996 case, more recently. And they say – they state at first that both issues of bifurcation as well as exclusion were being considered.

And bifurcation is not appropriate with the nature of the injuries has an important bearing on the question of liability. That is exactly what we are talking about, the foreseeability of Darwin's injuries. And it goes on to say, "Absent and express waiver are unusual circumstances. A party to a civil action is entitled to be present during all stages of the trial. And our view here, the movant relies solely on a stereotypical assumption that a party's disability will prejudice the jury."

There are insufficient grounds for excluding the party from the trial. So they're talking about extraordinary circumstances which do not present themselves in this Darwin [19] Green case. Also, in the *Carrie* case, they address once again the six-year old child who was burned. They talked about the *Helminsky* case, and they said cases where decided before the

enactment of the Americans with Disabilities Act, a law which specifically prohibits discrimination on the basis of physical or mental handicap, and it suggests that those cases be re-examined.

And they even cite specifically the *Helminsky* case, because under the American Disabilities Act, certainly the physically handicapped people have a right to be present at their own trial. And the other thing, not only is their argument not supported by affidavit or documents, but the laws that they cite, the case law they cite, the *Gorman* case which is really a woman who voluntarily was absent from the presence of her own trial and once again was before the Act.

And I think it was the case law throughout the country has shown that since the 1990 Act, they've certainly given strong credence to the judicial process and the rights of the disabled persons to be present regardless of their mental capacity, regardless of their physical incapacity.

But unless there is something that is preventing the jury from listening to the evidence, meaning noise and distractions and guttural sounds, if you will, or sudden outbreaks, then unless that is present and unless the Defendants can prove that that is going to happen in this [20] case, there is no way that Darwin can be precluded from this – from being present at trial for however long his attorneys and his mother decide that he should be here for the case. One second.

For those reasons, Your Honor, and once again, if the Court so decides to take a few moments – I don't know how long the tape lasts. I didn't watch the whole thing, but I think you will see –

THE COURT: I wasn't thinking in terms of watching a video tape, but I certainly was and believe I have to do some fact finding. So I thought it might be appropriate for me to

cancel the afternoon docket and drive out or delay the trial a day or so, maybe pick a jury tomorrow and visit with the Plaintiff.

MR. NEVIN: Your Honor, I feel as if – in my reaction to that, certainly we are capable of doing that. We have reserved our expert, Dr. Buchholz, to testify on Thursday and Friday, if necessary, so we could work that out. But the other thing is that the burden was on the Defendant to present this information at the time they made their motion, and they failed to do that. And for that reason alone, I think the motion should be denied.

THE COURT: I will make the proper ruling. I will keep the motion up all week, open all week if it takes that. I think that we shouldn't stand on technicalities here and [21] have me make a ruling merely because of one party or the other may have a burden. So the – in capsule form then, what is the – outside of the case as you've cited, what is the reason for having the Plaintiff here?

MR. NEVIN: The reason for having the Plaintiff here, Your Honor, is the element of proof of the foreseeability of the damages for someone in Darwin's situation when he walked into North Arundel Hospital on August 18, 1988 and the fact that even in liability, the issue alone, we have to prove the damages in fact occurred. And we can do that both by not only testimony, not only by medical records, but also by the presence of the Plaintiff himself.

So for those reasons and the fact that the law is strongly in favor of having Darwin Green present for his trial, that there are no extraordinary circumstances that would preclude him, and there is nothing, just by his physical presence, that would prevent from the jury from being able to their job or to interfere with –

THE COURT: You concur with – there will be instructions. There will be no communications from the Plaintiff to counsel or anyone else if he is not capable of any communications.

MR. NEVIN: There will be no verbal communication.

THE COURT: There will be no understanding on his part as to the process, the pleadings or the process.

[22] MR. NEVIN: We can't say that, Your Honor. We don't know what Darwin understands.

THE COURT: Well, none that we know about.

MR. NEVIN: Right, because he can't move. We know that. He can't physical move his body parts.

THE COURT: And he, of course, will be represented by counsel and his parents.

MR. NEVIN: I am sorry?

THE COURT: And his parents.

MR. NEVIN: Yes.

THE COURT: One of which is present here?

MR. NEVIN: Yes, his mother, Mrs. Hampton.

THE COURT: Okay. All right, counselor, I may well see that video, and I think I should. Is there anything further on that motion?

MR. KARSTEN: Yes, Your Honor. I would offer the Mount Washington records from the 1996, March '96, August '96, August '97, the annual summary reports of Darwin's conditions. The copy that we have here is yellow highlighted. We can provide a copy to the Court that is not yellow highlighted.

THE COURT: Overall objection, I gather. For the purposes of the record, I will accept those.

MR. KARSTEN: Thank you, Your Honor.

THE COURT: And for the purposes of this motion only.

[23] MR. KARSTEN: Do you want the non-highlighted – do you want the highlighted version or the non-highlighted version?

THE COURT: It really doesn't make any difference to the Court. We are not passing them on to a jury at this point.

MS. MALONE: Your Honor, regarding the video tape, the only video tape that I have seen of Darwin was back when he was cared for in his mother home. And if there is a new video tape at Mount Washington, I would like to know the date of it and how old Darwin was at the time of the taping?

MR. NEVIN: May 4th, 1994 is what it says.

MS. MALONE: I only have a video tape from when he was younger.

MR. KARSTEN: Yes, that is the one they took of –

MS. MALONE: I have not seen them.

THE COURT: Well, is there an evidentiary problem there?

MR. KARSTEN: We don't know. We haven't seen the video tape of –

THE COURT: Well, maybe we can exclude the Court and let you look at it first.

MR. KARSTEN: I assume it is Darwin, and I assume it is Mount Washington, so probably not. But we probably out to look –

[24] THE COURT: Now, counsel, let's go on to the next one.

MR. NEVIN: Your Honor, before we move on, getting Darwin here did require some arrangements with Mount Washington Hospital. Originally, we were scheduled to have him here tomorrow afternoon. With the Court's ruling, when he is expected – obviously, I will have to put him on whole because they do have to make arrangements for a nurse to be present with Darwin. Would a decision be made; would it be made tomorrow, and then I could just schedule it for another day for him to be in court. I am just looking for guidance.

THE COURT: As soon as I have the facts. Certainly, I realize that we are scheduled to pick a jury tomorrow. And certainly, we could pick a jury without his presence. I don't think that would go to the issue at all.

MR. NEVIN: Right, that is fine.

THE COURT: So you could certainly have – I suspect we won't get to any testimony tomorrow.

MR. KARSTEN: Your Honor, there is another – a couple of points to make in reply on that motion, and Mr. Nevin brings up the concept of jury argument. The jury argument from the Plaintiffs in this case is going to be, "You saw Darwin. That is what these Defendants caused," and that is why they are bringing him here. And that is precisely the thing which is the prejudice and the circumstance.

[25] THE COURT: Exactly. And it certainly can be covered by other evidence, and I can appreciate this. I think the crux of this depends on the physical condition of the Plaintiff and if he cannot communicate and if he does not understand the process. And if there is some slight annoyance to the jury, I am not sure how that would work. It might backfire upon the Plaintiffs in this instance to have him present in that condition.

As I understand the law, it is a judgment call, and at the Court's discretion.

And certainly I will be careful in making some fact findings first, but if it appears that he is unable to communicate in any fashion, if it appears the only reason for having him here is some matter of addressing the liability, then I would be inclined to rule that he not be present. But I still have the luxury of a few hours, and I will certainly refrain from making a decision until I see the video tape or perhaps appraise the situation beyond the medical reports. The next motion deals with excluding everything from the hospital where the heart attack occurred as I recall.

* * * *

APPENDIX G

Excerpts from Trial Court Ruling to Exclude the Party Plaintiff from the Courtroom at Trial Circuit Court for Anne Arundel County, Maryland October 6, 1997

[45]

* * * *

(Whereupon, the video tape was played for counsel.)

(Whereupon, there was a brief recess.)

THE COURT: The Court recalls Civil No. C-92-04223, medical malpractice case involving Darwin Green versus North Arundel Hospital et al. The Court has now had the opportunity to not only have heard from counsel in argument and reviewed the opposition and the memoranda addressing the particular motion that we address here which deals with the motion in [46] limine as to whether to exclude the Plaintiff from trial.

There seems to be rather little case law, particularly, locally, but the gist of the law is that the right of a party to a cause to be present for a trial is not an absolute right in a civil case. It is at the discretion of the court considering the possibility of prejudice under the totality of the circumstances whether the court should exclude the plaintiff.

The Court had read the case of *Helminsky* at 766 F.2d 208, a 1985 case and has the advantage over the District Court judge in that case, federal case, to have been able to consider not only the arguments of counsel but the records and transcripts of depositions and particularly the medical records that were introduced in this hearing. The Court has further had the opportunity to review the video tape in total of the Plaintiff at the hospital being tended by the various nurses, three at one point.

Let me address that video which goes on at length showing the Plaintiff virtually motionless except for some eye blinking and except for periods of time when instruments were inserted by way of the feeding tube and the suctioning from the neck or throat area which the Court understands by the records is done periodically, perhaps as often as every two hours. At that point, there is a jerking movement that lifts his legs and the extension of his arms above and about the bed [47] he lies in.

Later on in that particular video, there is a nurse who places a rubber ball in front of him, attempts to place it in his hand which is deformed, and both extensions of his arms being deformed and hands, and his feet being twisted as well, and the toes being interlocked in a grotesque twist. And there is an attempt by the nurse to gain his attention first with a ball, and receives no response. His eyes not even passing the ball as it is moved close to his head across his eyes.

The other instrument used to alert the Plaintiff is a electronic drum or toy of some type where he is to push certain buttons I guess to get a response sound-wise, a mechanical thing which he is unable to operate in any fashion and seems not particularly interested in. Unlike the judge in Helminsky, this Court then has an opportunity short of actually visiting with the Plaintiff and the time in light of the fact that we are going to try this case in the morning precludes that visit.

But short of that, the Court feels confident to do some fact finding. And those facts are that and this particular Plaintiff does not have the ability to communicate in any fashion with counsel or his parents or the nurses in this video. And the Court is convinced that he will not be able to aide his counsel in prosecuting the case and offering [48] any sort of input beyond that. It is also crystal clear that the Plaintiff would not understand or comprehend the process that we go through in trial, the pleadings filed or any portion or part of the trial.

It has been suggested by the Plaintiffs' attorney that we don't know whether he can understand the process or not, because there is no indication apparently any response that would tell us that one way or the other. And that may be possible, but even if it is so and truthful, that understanding is not conveyed in any fashion to his parents or to the attorneys that will be representing him. The Court finds then that he is reduced to the vegetable state. That there can be no purpose in presenting the Plaintiff of short of prejudice to the Defendant's case.

Now, the law, as cited in *Gorman v. Sabo* and other cases, *Georgetown College, Safeway Stores, Inc. v. Watson,* et cetera, is that we should not exclude a partly merely because he is not an attractive individual to gaze upon. That the injuries have suffered him to the point or her to the point where they cannot be presentable, but if they could provide some input into the prosecution of the case. In this instance, there can be no input to the Plaintiffs' counsel. The Court cannot arbitrarily deny a party's right to be present during trial because of the party's appearance, but the possibility of prejudice is to be weighed.

[49] And in this instance, the Court finds that it is great beyond the extension of any instructions that could be offered and will be offered in all likelihood in any case as to sympathy or prejudice public opinion. In this instance, the Court finds that the – to grant a fair trial which would go to all of the parties would require excluding the presentation of the Plaintiff. There are some obvious practical reasons that go beyond the rulings of law as the Court understands it.

And that is the understanding the Court has at this point that the limited noises that would be forthcoming from the Plaintiff and the fact that the Plaintiff would at all times, as I understand it, be accompanied by at least one nurse. And, in fact, taking three to address his injuries during the course of the

video tape, the Court must also look to the obligation to not interfere with the jury's finding, an impartial finding, a fair finding of the facts which is not based upon any emotions or sympathy that the jury might feel.

The burden of persuasion is to the moving party, and they have carried that burden in this instance. The Defendant who seeks to exclude a handicapped plaintiff must establish that the presence of the plaintiff would prevent and substantially impair the jury's performance. The impairment or the prejudice must be so great that the jury instructions would not likely correct that prejudice.

[50] And having viewed the tape, the Court is convinced that any viewing of the Plaintiff in person or by a video would leave any party in a position to be emotionally struck and otherwise feeling sympathy for the Plaintiff. This trial is also a matter which is bifurcated. We addressed the matter of liability. And so, therefore, the Court sees no necessity as it would if and when we are at the state of the portion of the trial addressing damages to have the Plaintiff present.

Obviously, if the case were not bifurcated, or at least, I think, the Court would have a different slant on the particular circumstances which at some point it will certainly be necessary going beyond liability to address damages and then, of course, to have the Plaintiff presented if that are the wishes of the prosecutors of the claim. The Court has had the opportunity to address *Mason v. Moore* as well and *Talcott v. Hall.* And so, therefore, grants the Defendants' motion in limine to exclude the Plaintiff from trial.

* * * *

(2)

No. 01-1303

Supreme Court, U.S.
FILED
APR 4 2002

IN THE

Supreme Court of the United States

DARWIN GREEN, *et al.*,
Petitioners,

v.

NORTH ARUNDEL HOSPITAL ASSOCIATION, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of Maryland

RESPONDENT NORTH ARUNDEL HOSPITAL ASSOCIATION, INC.'S BRIEF IN OPPOSITION

LUTHER ZEIGLER *
CROWELL & MORING LLP
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 624-2598

KURT D. KARSTEN
COWDREY, THOMPSON & KARSTEN, P.A.
621 Ridgely Avenue
Suite 402
Annapolis, Maryland 21401
(410) 841-1938

* Counsel of Record

Attorneys for Respondent North Arundel Hospital Association, Inc.

April 4, 2002

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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QUESTION PRESENTED

The Maryland Court of Appeals held that:

> In the liability phase of a bifurcated trial, the court has discretion to exclude a plaintiff where, after a hearing and an opportunity to observe the plaintiff, either in person or by other reliable means, the court determines, on the record, that: (1) the plaintiff is severely injured; (2) the plaintiff attributes those injuries to the conduct of the defendant(s); (3) there is a substantial prospect that the plaintiff's presence in the courtroom may cause the jury to side with the plaintiff out of emotional sympathy rather than on the evidence; (4) the plaintiff is unable to communicate or participate in the trial in any meaningful way; *and* (5) the plaintiff would be unable even to comprehend the proceeding.

Pet. App. 29a-30a. The question presented is whether this holding violated Petitioner's rights under the Due Process or Equal Protection Clauses of the United States Constitution or gives rise to a remedy under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq*.

RULE 29.6 STATEMENT

Pursuant to this Court's Rule 29.6, the North Arundel Hospital Association, Inc. states that it is a non-stock, not-for-profit corporation whose sole member is the North Arundel Health System, Inc., also a non-stock, not-for-profit corporation. The sole member of North Arundel Health System, Inc., in turn, is the University of Maryland Medical System, Inc., also a non-stock, not-for-profit corporation.

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U.S. Const. amend. XIV ..... *passim*

Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* 7, 18

Fed. R. Evid. 615 12

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On Petition for a Writ of Certiorari to the Court of Appeals of Maryland

RESPONDENT NORTH ARUNDEL HOSPITAL ASSOCIATION, INC.'S BRIEF IN OPPOSITION

Respondent North Arundel Hospital Association, Inc., ("the Hospital") respectfully requests that this Court deny the petition for writ of certiorari. The opinion of the Court of Appeals of Maryland is reported at 366 Md. 597, 785 A.2d 361 (2001) and is reprinted in the Petition's Appendix at pages 1a-67a. The opinion of the Maryland intermediate appellate court is reported at 126 Md. App. 394, 730 A.2d 221 (1999) and reprinted in the Appendix at pages 68a-101a.

COUNTERSTATEMENT

The facts relating to Darwin Green's medical history are accurately set forth in the Court of Appeals' opinion at pages

3a-4a of the Appendix. The procedural history pertinent to the disposition of this Petition is as follows:

1. Just prior to trial, the Hospital moved to exclude Darwin Green from being present during the liability phase of his medical malpractice trial. The motion was premised on the facts that Darwin was and is in a vegetative state, unable to communicate, unable to participate or assist in any way with the presentation of his case, and unable even to understand what would be transpiring in court. Moreover, because his disabilities require constant nursing care and conspicuous medical equipment,[1] Darwin's presence in the courtroom would inevitably and understandably create a distraction for the jury. Based on these considerations, the Hospital argued that Darwin's presence at trial could serve no purpose other than to prejudice the jury against the defendants. Pet. App. 155a-159a.

2. In response to the motion, Petitioner's counsel urged the trial court to watch a "day in the life" video of Darwin so as to observe his condition and capabilities. The trial judge did so. Pet. App. 172a. The court also considered other evidence pertinent to the issue, including deposition transcripts and medical records. *Id.* After reviewing these materials, the trial court made these findings:

> Let me address that video which goes on at length showing the Plaintiff virtually motionless except for some eye blinking and except for periods of time when instruments were inserted by way of the feeding tube and the suctioning from the neck or throat area which the court understands by the records is done periodically, perhaps as often as every two hours. At that point, there is some jerking movement that lifts his

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[1] "Darwin was bound to a wheelchair, required twenty-four hour medical attention from nurses, breathed through a hole in his neck, and had to be fed via a feeding tube approximately every two hours." Pet. App. 71a.

legs and the extension of his arms above and about the bed he lies in.

. . . .[T]he Court feels confident to do some fact finding. And those facts are that and this particular Plaintiff does not have the ability to communicate in any fashion with counsel or his parents or the nurses in this video. And the Court is convinced that he will not be able to aid his counsel in prosecuting the case and offering any sort of input beyond that.

. . . . The Court finds then that he is reduced to the vegetable state. That there can be no purpose in presenting the Plaintiff short of prejudice to the Defendants' case.

. . . . In this instance, there can be no input to the Plaintiff's counsel. The Court cannot arbitrarily deny a party's right to be present during trial because of the party's appearance, but the possibility of prejudice is to be weighed.

And in this instance, the Court finds that it is great beyond the extension of any instructions that could be offered and will be offered in all likelihood in any case as to sympathy or prejudice public opinion. In this instance, the Court finds that . . . to grant a fair trial which would go to all parties would require excluding the Plaintiff. . . .

Pet. App. 94a-96a (trial court's findings as quoted in part by Court of Special Appeals). *See also* Pet. App. 172a-175a (trial court's findings in full).

3. At the *in limine* motions hearing, counsel for Petitioner made it clear that counsel did *not* seek to have Darwin Green present throughout the entire trial. Pet. App. 14a, 164a. On the contrary, as confirmed in Petitioner's brief in the court below, counsel "only sought his presence in the courtroom for a period of time less than an hour, on one day of trial. . . ." Pet. App. 14a-15a. This acknowledgment reveals the

ultimate cynicism of the Petition: Although counsel now seeks to champion the constitutional rights of disabled persons to attend and fully participate in all phases of civil trials, counsel's actions in the trial court in this case belie that stated intention.[2] Far from wanting to secure Darwin Green's right to be present throughout his trial, his lawyer merely wanted the opportunity briefly to present him to the jury for the obvious purpose of stirring their sympathies. As the Court of Appeals astutely (if bluntly) observed, these actions by Petitioner's counsel demonstrate rather clearly that the true purpose of seeking his attendance was to present him "as an exhibit, not to implement his Constitutional, statutory, or common law right to be present." Pet. App. 15a, n. 4.

4. At the conclusion of the *in limine* hearing, the trial court granted the Hospital's motion to exclude Darwin Green from the liability phase of his trial.[3] It explained:

> The burden of persuasion is on the moving party and they have carried that burden in this instance. The Defendant who seeks to exclude a handicapped plaintiff must establish that the presence of the plaintiff would prevent and substantially impair the jury's performance. The impairment or the prejudice must be so great that the jury instructions will not likely correct that prejudice.

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[2] Petitioner's counsel argued in the trial court that Darwin's presence was necessary as an element of Petitioner's *proof*. *See* Pet. App. 167a ("The reason for having the Plaintiff here, Your Honor, is the element of proof of the foreseeability of the damages for someone in Darwin's situation . . . ."). The point of having Darwin in court, according to his lawyer, was so that the jury could see "what his condition is and that that is something that is foreseeable." Pet. App. 164a. Petitioner's counsel repeatedly emphasized below that, for these "evidentiary" purposes, Darwin's presence *throughout* trial was not necessary. Pet. App. 164a ("And as we've indicated, he is not going to be sitting here the entire time for trial.")

[3] One or both of Darwin's parents were in attendance throughout the trial, along with his counsel. *See* Pet. App. 168a.

> And having viewed the tape, the Court is convinced that any viewing of the Plaintiff in person or by video would leave any party in a position to be emotionally struck and otherwise feeling sympathy for the Plaintiff. This trial is also a matter which is bifurcated. We addressed the matter of liability. And so, therefore, the Court sees no necessity as it would if and when we are at the state of the position of the trial addressing damages to have the Plaintiff present.
>
> Obviously, if the case were not bifurcated, or at least, I think, the Court would have a different slant on the particular circumstances which at some point it will certainly be necessary going beyond liability to address damages and then, of course, to have the Plaintiff presented if th[ose] are the wishes of the prosecutors of the claim.

Pet. App. 175a. As both appellate courts below noted, the trial court's findings "show that Judge Rushworth went to great lengths to ensure that Darwin's constitutional rights were not violated by arbitrarily excluding him from trial." Pet. App. 96a. *See also* Pet. App. 16a. These express findings also demonstrate the factual inaccuracy upon which the question presented by this Petition is premised: although Petitioner claims that "the trial judge made no finding . . . of actual prejudice to the defendants" (Pet. i), the transcript of the *in limine* hearing proves otherwise. Pet. App. 172a-175a.

5. Ultimately, the trial court's exclusion of Darwin Green, although plainly correct, was of no legal import one way or the other so far as the Hospital's alleged liability was concerned. This is because, at the close of Petitioner's case, the trial judge granted a directed verdict in favor of the Hospital as a matter of law on the grounds that (1) Darwin Green had failed to adduce any evidence of direct negligence on the part of the Hospital and (2) there was insufficient evidence to support an inference of vicarious liability against the Hospital under any "apparent agency" standard. Pet. App.

2a, 71a.[4] Petitioner never challenged the propriety of this directed verdict ruling. Pet. App. 98a. As the Court of Special Appeals held, because the Hospital was determined not to be liable as a matter of law, "[w]hether Darwin had been in the courtroom during the entire trial up to the point where the motions were granted could not possibly have helped appellants prove their case against [the Hospital] or Dr. Mody." *Id.*

6. Nor did the trial court's exclusion of Darwin Green ultimately affect the liability determination as to the remaining defendants. Although the case went to the jury as to Respondents Axelbaum and Fields, the jury returned a special verdict in favor of both of them, specifically finding that they had not deviated from the appropriate standard of care in treating Darwin Green. Pet. App. 98a. As the intermediate appellate court correctly noted, even "[i]f Darwin had been present during every minute of the trial, his presence could not have affected the answer to that standard of care question." *Id.*

REASONS TO DENY THE WRIT

The Court of Appeals' decision was both narrow in scope and in keeping with well-settled constitutional norms. It held that:

> In the liability phase of a bifurcated trial, the court has discretion to exclude a plaintiff where, after a hearing and an opportunity to observe the plaintiff, either in person or by other reliable means, the court determines, on the record, that: (1) the plaintiff is severely injured; (2) the plaintiff attributes those injuries to the conduct of the defendant(s); (3) there is a substantial prospect that the plaintiff's presence in the courtroom may cause the

[4] The trial court also directed a verdict in favor of one of the individual defendants, Dr. Harshad R. Mody.

> jury to side with the plaintiff out of emotional sympathy rather than on the evidence; (4) the plaintiff is unable to communicate or participate in the trial in any meaningful way; *and* (5) the plaintiff would be unable even to comprehend the proceeding.

Pet. App. 29a-30a. The Court of Appeals concluded that to exclude a plaintiff from the courtroom in this precise context was neither an abuse of discretion nor a violation of plaintiff's constitutional, statutory, or common law rights because "[w]hen all of those circumstances exist, as they did here, the plaintiff's presence is not truly an exercise of his/her right of presence, for the plaintiff is incapable of making a conscious decision in that regard." *Id.* 30a.

Contrary to the Petition, this decision is plainly correct and raises no conflict as to any question of federal law. Although Petitioner suggests that the decision below is at odds with the holdings of several state courts of last resort, in fact *none* of the cases holds that a plaintiff has an absolute federal constitutional right to be present at a civil trial. Indeed, we are aware of no case, state or federal, to so hold. Rather, as we detail below, the cases relied upon by Petitioner either have no bearing on the issue presented here or rest entirely on state law grounds. There is no "disarray" among the lower courts as to the applicable federal constitutional law standards in this setting, and the Maryland Court of Appeals' carefully tailored decision is well within the mainstream of the case law in this area.

Finally, there is no colorable issue presented by the Petition under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq*. The courts below correctly concluded that, even were the ADA to apply here, its remedial scheme is expressly limited to various forms of compensatory damages or injunctive relief against whatever persons may be adjudged to have violated the statute. Nowhere in the statute, its regulations, or the case law "is there stated, or even

suggested, that, where the complaint concerns the exclusion of a disabled person from the courtroom by judicial ruling, reversal of the judgment entered in the case is a permissible remedy." Pet. App. 19a. Nor does the Petition cite any authority for this remarkable proposition.

I. THERE IS NO CONFLICT AMONG THE LOWER COURTS AS TO ANY FEDERAL QUESTION.

A. In the decision below, the Maryland Court of Appeals acknowledged, "[i]n concert with courts throughout the country," that "a party to civil litigation has a right to be present for and to participate in the trial of his/her case." Pet. App. 20a. The Court of Appeals explained that the source of that right "emanates, at least, from the common law of Maryland, from the due process clause of the Fourteenth Amendment to the U.S. Constitution, from the Maryland equivalent of that clause, Article 24 of the Declaration of Rights, and from Article 19 of the Declaration of Rights." *Id.* However, the court below also "made clear, as have most other courts in the nation, that the right is not absolute—that there are circumstances in which a civil case may proceed without the attendance of a party and, indeed, with the party excluded." *Id.*

In framing the issue, the court below carefully reviewed and considered federal and state case law from across the country discussing the scope of the right to be present at trial and defining the very narrow set of circumstances in which it may be appropriate for a trial court to exclude or limit a party's presence in the courtroom. Pet. App. 21a-29a. Finding the Sixth Circuit's analysis in *Helminski v. Ayerst Lab.*, 766 F.2d 208 (6th Cir. 1985) to be particularly helpful, the Court of Appeals here recognized that " 'a plaintiff who can comprehend the proceedings and aid counsel may not be excluded from any portion of the proceedings absent

disruptive behavior or a knowing and voluntary waiver,' and that includes a plaintiff with a 'solely physical abnormality . . . even when the abnormality is due allegedly to the defendant's wrongful conduct.' " Pet. App. 26a (quoting *Helminski*). And, like the Sixth Circuit in *Helminski*, the Court of Appeals below acknowledged that "although the mere sight of a severely injured plaintiff may evoke jury sympathy, 'juror sympathy alone is insufficient to establish juror prejudice' for, generally, a jury will follow the court's instructions and decide the case solely on the facts." *Id.*

However, the Maryland Court of Appeals also agreed with the Sixth Circuit (and the many other courts to have faced the issue) that there may be a narrow range of circumstances where exclusion is necessary to ensure a fair trial. Again, quoting from *Helminski*, the court below explained:

> . . . there may be occasions when the mere presence of a party would render the jury unable to arrive at an unbiased judgment concerning liability. Should such a case arise and the presence of the party would not aid the fair administration of justice, the trial court can exclude the plaintiff or limit his presence. A party's involuntary exclusion under these circumstances would not constitute a denial of due process.

Pet. App. 26a. Such a narrow exception, the court noted, has been widely recognized. *See* Pet. App. 23a-28a (citing *Dickson v. Bober*, 269 Minn. 334, 130 N.W.2d 526 (1964); *Morley v. Superior Court of Arizona*, 131 Ariz. 85, 638 P.2d 1331 (1981); *In re Richardson-Merrell, Inc.*, 624 F. Supp. 1212 (S.D. Ohio 1985); *Gage v. Bozarth*, 505 N.E.2d 64 (Ind. App. 1987); *Bremner v. Charles*, 312 Or. 274, 821 P.2d 1080 (1991); *Burks v. Harris*, 1992 WL 322375, 1992 Tenn. App. LEXIS 913 (Tenn. App. 1992); *Province v. Center for Women's Health & Family Birth*, 20 Cal. App. 4th 1673, 25 Cal. Rptr.2d 667 (1993); *Caputo v. Joseph J. Sarcona Trucking Co.*, 204 A.D.2d 507, 611 N.Y.S.2d 655 (A.D.

1994); *Reems v. St. Joseph's Hosp.*, 536 N.W.2d 666 (N.D. 1995); *Wozniak v. New Britain General Hosp.*, 2001 WL 717497, 2001 Conn. Super. LEXIS 1547 (2001)).

Based on this analysis, the Court of Appeals concluded that the trial court in this case had not abused its discretion in excluding Darwin Green from the liability phase of his civil trial. The Court was quite careful to say, however, that its "holding is a narrow one"—namely: "In the liability phase of a bifurcated trial, the court has discretion to exclude a plaintiff where, after a hearing and an opportunity to observe the plaintiff, either in person or by other reliable means, the court determines, on the record, that: (1) the plaintiff is severely injured; (2) the plaintiff attributes those injuries to the conduct of the defendant(s); (3) there is a substantial prospect that the plaintiff's presence in the courtroom may cause the jury to side with the plaintiff out of emotional sympathy rather than on the evidence; (4) the plaintiff is unable to communicate or participate in the trial in any meaningful way; *and* (5) the plaintiff would be unable even to comprehend the proceeding." Pet. App. 29a-30a. The Court of Appeals noted the existence of some "decisions holding that the exclusion of a party from a civil trial was error," but it explained, correctly, that none of them involved a party who was "(1) wholly unable to communicate or assist in the presentation of the case, (2) incapable of comprehending the proceeding, and (3) excluded only from the liability phase of a bifurcated trial, where his/her presence would likely be both prejudicial to the defendant and irrelevant, in an evidentiary sense, to any issue then before the jury." Pet. App. 28a.

B. The Petition's primary argument in favor of review is that there is a purported conflict created by the decision below as to "a matter of United States constitutional law" regarding the rights of a disabled litigant to be present at his or her civil trial. Pet. 13. Petitioner claims that "[s]everal states have ruled that a plaintiff has *an absolute right* to be

present at his or her civil trial" (*id.* 15 (emphasis added))—identifying cases from Connecticut, Illinois, Michigan, New Jersey, New York and North Carolina—and that the decision below is at odds with these cases.

Petitioner is incorrect. Exactly *none* of the cases cited in the Petition holds that a plaintiff has, as a matter of federal constitutional law, an absolute right to be present at a civil trial. Petitioner creates the appearance of a conflict only by mischaracterizing (or ignoring) the actual holdings of these cases and taking quotations from them out of context. Moreover, nearly all of these decisions rest on considerations of state, not federal, law. We address them in the order cited by Petitioner:

1. Connecticut—*Rozbicki v. Huybrechts*, 218 Conn. 386, 589 A.2d 363 (1991), cited in the Petition at page 15, presented no issue of federal law. The sole question decided in that case was the right of a party under Connecticut law to be present during pre-trial voir dire proceedings. 589 A.2d at 363 ("This appeal concerns the state constitutional right of a party to a civil action to be present during the voir dire of potential jurors.") Moreover, the court's holding was limited to voir dire rights. Subsequent Connecticut case law notes that "*Rozbicki* does *not* state that a party has an absolute right to attend trial. . . ." *Wozniak v. New Britain General Hospital*, 2001 WL 717497 at *2, 2001 Conn. Super. LEXIS 1547 at *6 (June 1, 2001) (emphasis added).

2. Illinois—*Odum v. Corn Products Refining Co.*, 173 Ill. App. 348, 1912 Ill. App. LEXIS 421 (1912), also cited at page 15 of the Petition, was an intermediate Illinois appellate court decision that likewise presented no federal question of any sort. Moreover, it did not even involve the rights of a *party* to attend trial. *Odum* was a wrongful death action by the administrator of an estate against the deceased's former employer where the employer sought to exclude the deceased's widow and children from the courtroom for fear

that their presence would arouse juror sympathies. The trial court ruled, uncontroversially enough, that there was no basis in Illinois state law for excluding persons with an interest in the outcome of a case from watching the trial; a ruling the appellate court had no trouble affirming. There is nothing in *Odum* of any relevance to the question presented by the Petition. It decided no issue of federal law, no issue regarding the rights of the disabled, and no issue relating to the rights of a party to attend his civil trial.

3. Michigan—*McIntosh v. McIntosh*, 79 Mich. 198, 44 N.W. 592 (1890), cited at page 16 of the Petition, also presented no federal issue. It addressed the reach of Michigan's common-law "rule of exclusion" relating to witnesses (a state law analog to what is now Fed. R. Evid. 615)—*i.e.*, whether the trial court had the discretion under state procedure (as it existed in 1890) to exclude the defendant father from the courtroom during his son's testimony. The court resolved the question as a matter of state procedural law without addressing any constitutional question, state or federal.[5] It is wholly inapposite.

4. New Jersey—*Leonard's of Plainfield, Inc. v. Dybas*, 130 N.J.L. 135, 31 A.2d 496 (1943), cited at page 16 of the Petition, involved a case where the trial judge gave the jury supplemental instructions outside of the courtroom and outside of the presence of either the defendant or his attorney. The New Jersey Supreme Court held, unremarkably, that "if supplementary instructions are deemed necessary" in a case, "they shall be given only in open court in the presence of the

---

[5] *Florence v. Wm. Moors Concrete Products, Inc.*, 35 Mich. App. 613, 193 N.W.2d 72 (1971), cited at footnote 5 of the Petition, is an intermediate appellate court decision from Michigan which likewise rested entirely on state law. It held merely that the trial court in that case erred under Michigan law by excluding the plaintiffs from the courtroom when the court re-read the charge to the jury.

parties and their counsel. . . ." 31 A.2d at 497. *Leonard's* has nothing to do with the issues presented here.

5. New York—*Carlisle v. County of Nassau*, 64 A.D.2d 15, 408 N.Y.S.2d 114 (1978), cited at page 16 of the Petition, was an intermediate New York appellate case holding that it was error for the trial judge to exclude the plaintiff from voir dire merely because he was wheelchair-bound. However, as that same New York appellate department explained later in *Caputo v. Joseph J. Sarcona Trucking Co.*, 204 A.D.2d 507, 611 N.Y.S.2d 655 (1994), *Carlisle* did *not* hold that a disabled person's right to be present at trial is absolute. On the contrary, and consistent with the Maryland Court of Appeals' holding here, the *Caputo* court explained:

> Although the physical condition of a plaintiff, in and of itself, is not enough to justify his involuntary exclusion from any phase of the trial (*see Carlisle v. County of Nassau*, 64 A.D.2d 15, 408 N.Y.S.2d 114), *when a plaintiff is both physically and mentally incapable and his mental capacity prevents him from assisting counsel in any meaningful way, then the decision to exclude the plaintiff from the liability phase of a trial lies within the sound discretion of the trial court. . . .*

611 N.Y.S.2d at 656 (emphasis added).

6. North Carolina—*Raper v. Berrier*, 246 N.C. 193, 97 S.E.2d 782 (1957), also cited at page 16 of the Petition, was a child custody dispute where the trial judge conducted an ex parte interview of the minor child over the objection of the father. The North Carolina Supreme Court held, as a matter of North Carolina law, that such interviews in child custody proceedings should take place in open court with all parties present. That case, too, rested on state law and has nothing to do with the issues raised by the Petition.

* * * *

In sum, Petitioner's contention that the decision below "conflicts" with other cases is demonstrably incorrect. None of the cases cited in the Petition recognize an absolute federal constitutional right of a party to be present at all phases of a civil trial. There is no conflict warranting this Court's review.

II. THE DECISION BELOW IS CONSISTENT WITH SETTLED CONSTITUTIONAL PRINCIPLES.

A. As demonstrated above, the Maryland Court of Appeals' decision is in accord with settled case law around the country in holding that there may be exceptional circumstances—like those presented here—that justify a trial court in excluding a severely disabled plaintiff from the liability phase of his or her civil trial. To our knowledge, neither this Court nor any other federal or state court has ever held to the contrary—*i.e.,* that the due process or equal protection clauses of the federal constitution guarantee a litigant the *absolute* right to be present at all phases of trial.

Despite this absence of authority, Point II of the Petition argues that, as a matter of constitutional policy, excluding a severely disabled litigant even in the extremely prejudicial circumstances of this case necessarily compromises "the basic fairness of the trial. . . ." Pet. 24. There is no merit to this argument. As the appellate court below noted, the trial judge went to great lengths to ensure the overall fairness of the proceedings. Pet. App. 96a. Moreover, though Darwin was excluded from the liability phase of the trial, his parents were not. They were present, along with his counsel. Indeed, prior to excluding Darwin, the trial judge obtained a commitment from Petitioner's counsel that one or both of Darwin's parents would attend the trial. Pet. App. 168a. For these reasons, the Petition's claim that the trial judge conducted a "trial *in absentia*" that "is abhorrent to all modern-day notions of justice" (Pet. 24) is sheer hyperbole.

Equally unavailing is the claim that Petitioner had a constitutional right to "confront" witnesses testifying against him "face to face." Pet. 23-24. To our knowledge, no court has ever held that a plaintiff in a civil case has any such constitutional right. Indeed, trial courts in civil cases routinely permit testimony to be given by witnesses other than in the face-to-face context of open court—for example, testimony by transcribed or videotaped deposition is plainly allowed when a witness is outside the subpoena power of a court or otherwise unavailable. In any event, our civil justice system has a panoply of safeguards in place designed to instill a respect for truth-telling by witnesses, including the right of cross-examination, penalties of perjury for false testimony, the contempt powers of the court, and the ultimate confidence our system places in the jury to distinguish honest answers from prevarication.

The only genuine issue of "fairness" presented by cases such as this one is the concern—directly and correctly addressed by the lower courts here—that juries decide such cases based on the evidence and not on natural feelings of human sympathy for severely disabled persons. In cases where the disabled plaintiff can participate in the proceedings, assist counsel, or otherwise comprehend and make decisions concerning the trial, the right of such a plaintiff to be present at his or her trial generally needs to be respected and the trial court should typically address issues of potential prejudice through means other than exclusion, such as by giving the jury cautionary instructions. However, in those exceptional cases, such as this one, where the plaintiff cannot exercise his right to be present in any meaningful way, trial judges should be given the discretion to determine whether the risks of prejudice are best addressed through exclusion. Certainly, nothing in the Constitution forbids the exercise of such discretion on the facts presented here.

Finally, the Petition's suggestion that the appellate courts below engaged in standardless review of the Circuit Court's exclusionary ruling (*see* Pet. 25), or that the trial court failed to "undertake specific fact-finding" (*id.*), is contrary to the record. The lower courts carefully articulated and applied the constitutional standards and analysis developed in the case law (*see* Pet. App. 20a-30a, 90a-99a), and the trial judge conducted a thorough evidentiary hearing and supported his conclusions with specific findings of fact. *See id.* 172a-175a. There was no error, much less one of constitutional dimensions.

B. This case does not, in any event, provide the Court with a suitable context in which to review the constitutional question posed by the Petition, even if that question were otherwise worthy of this Court's review. This is so for two reasons:

1. As noted by the Court of Appeals in footnote 4 of its opinion (Pet. App. 15a), there is a substantial issue as to whether Petitioner waived the argument that he had a constitutional right to be present *throughout* his trial. Indeed, the sudden enthusiasm counsel for Petitioner now expresses for the rights of the disabled to be present throughout *all* phases of civil trials is directly undermined by her stated willingness in the courts below to drastically limit Darwin's attendance at trial—*i.e.*, to offer to have him present "for a period of time less than an hour, on one day of the trial. . . ." Pet. App. 15a. If Darwin's asserted constitutional right to be present throughout trial is as fundamental to his due process and equal protection interests as the Petition now claims, and is equally necessary to the administration of a fair trial, one wonders why counsel was so willing to compromise those rights just to get Darwin in front of a jury for an hour? To state the question is to answer it. *See* Pet. App. 15a n. 4 ("If, as we are now told, the intent was to have him brought in on one day for less than an hour, the implication is even stronger

that his presence would simply be as an exhibit, not to implement his Constitutional, statutory, or common law right to be present.") This also renders particularly disingenuous Petitioner's counsel's attempt to chastise the Court of Appeals for reducing Darwin "to an object, to be exhibited to the jury" (Pet. 28), since it was *counsel* who initially sought to justify Darwin's presence in these evidentiary terms. *See* Pet. App. 167a. In any case, these issues of waiver would, at a minimum, complicate this Court's review of the question presented and render this case less than ideal for the exercise of certiorari jurisdiction.

2. There is also some doubt as to whether the correctness of the trial court's exclusionary ruling regarding Darwin's presence at trial was necessary to support the judgment below. As the intermediate appellate court held, because the Circuit Court directed verdicts in favor of the Hospital and Dr. Mody *as a matter of law*—rulings that were never appealed by Petitioner—Darwin's attendance in the courtroom could have had no affect on these strictly legal determinations: "Whether Darwin had been in the courtroom during the entire trial up to the point where the motions were granted could not possibly have helped appellants prove their case against [the Hospital] or Dr. Mody." Pet. App. 98a.

Similarly, the trial court's exclusion of Darwin Green did not ultimately affect the liability determination as to the remaining defendants. Although the case went to the jury as to Respondents Axelbaum and Fields, the jury returned a special verdict in favor of both of them, specifically finding that they had not deviated from the appropriate standard of care in treating Darwin Green. Pet. App. 98a. As the intermediate appellate court correctly noted, even "[i]f Darwin had been present during every minute of the trial, his presence could not have affected the answer to that standard of care question." *Id.*

The Court of Appeals, for whatever reason, never passed on these alternative holdings of the intermediate appellate court. However, we submit that they were correct and that resolution of the "right to attend" issue was not—and is not—strictly necessary to the proper disposition of this case. This consideration likewise counsels against certiorari review by this Court.

III. THERE IS NO ISSUE UNDER THE ADA PRESENTED BY THE PETITION THAT IS WORTHY OF THIS COURT'S REVIEW.

The ADA provides for specific remedies—ranging from compensatory damages to injunctive relief, depending upon the circumstances—where a plaintiff establishes the requisite statutory elements of discrimination in employment or public accommodations. However, as the Court of Appeals correctly held, nowhere in the ADA or its regulations "is there stated, or even suggested, that, where the complaint concerns the exclusion of a disabled person from the courtroom by judicial ruling, reversal of the judgment entered in the case is a permissible remedy." Pet. App. 19a. Nor does the Petition cite a single case in support of such an expansive reading of the ADA's remedial provisions.

Thus, even assuming that the trial court's exclusion of Darwin Green could somehow be construed as a substantive violation of the statute—and Petitioner has cited no case in support of that proposition either—the ADA's remedial scheme cannot fairly be interpreted to authorize, much less require, setting aside a judgment in a civil case between private parties. In this regard, we can do no better than to repeat the Court of Appeals' holding on this point: "There is no provision in either Federal or State law, to the best of our knowledge—and none has been cited to us—authorizing the reversal of a judgment in a civil case or the awarding of a new trial as a remedy" in these circumstances. Pet. App. 18a.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

LUTHER ZEIGLER *
CROWELL & MORING LLP
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 624-2598

KURT D. KARSTEN
COWDREY, THOMPSON &
KARSTEN, P.A.
621 Ridgely Avenue
Suite 402
Annapolis, Maryland 21401
(410) 841-1938

* Counsel of Record

Attorneys for Respondent
North Arundel Hospital
Association, Inc.

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Supreme Court of the United States

DARWIN GREEN, et al.,

Petitioners,

v.

NORTH ARUNDEL HOSPITAL ASSOCIATION, INC., et al.,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Maryland

BRIEF OF RESPONDENTS, RICHARD T. FIELDS, M.D., STEWART P. AXELBAUM, M.D., AND HARSHAD R. MODY, M.D., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

EDWARD S. HOROWITZ, ESQUIRE
(*Counsel of Record*)
LARRY A. CEPPOS, ESQUIRE
JAMES S. KNERR, ESQUIRE
ARMSTRONG, DONOHUE, CEPPOS & VAUGHAN, CHARTERED
204 Monroe Street, Suite 101
Rockville, Maryland 20850
301/251-0440
Attorneys for Respondents Richard T. Fields, M.D. and Stewart P. Axelbaum, M.D.

JAMES A. ROTHSCHILD, ESQUIRE
E. DALE ADKINS, III, ESQUIRE
LYNN B. MALONE, ESQUIRE
GREGORY L. VANGEISON, ESQUIRE
ANDERSON, COE & KING, LLP
201 North Charles Street, Suite 2000
Baltimore, Maryland 21201
410/752-1630
Attorneys for Respondent Harshad R. Mody, M.D.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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BRIEF OF RESPONDENTS, RICHARD T. FIELDS, M.D., STEWART P. AXELBAUM, M.D., AND HARSHAD R. MODY, M.D., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Richard T. Fields, M.D., Stewart P. Axelbaum, M.D. and Harshad R. Mody, M.D., respectfully request that this Court deny the petition for writ of certiorari.

COUNTERSTATEMENT

Because of the alleged negligence of other health care providers, with whom Petitioners long ago settled their claims for a significant sum, Darwin Green (hereinafter "Green") sustained a devastating brain injury that left him in a persistent vegetative state.[1] Pet. App. 2a-5a. When Petitioners subsequently sought to recover additional money damages against the present Respondents in a Maryland state court of general jurisdiction, the trial judge recognized the risk that the compelling nature of Green's injuries would likely prevent a jury from objectively evaluating Petitioners' vaporous liability case against Respondents. The trial judge therefore ordered a bifurcation of the issues of liability and damages, for separate trials. Petitioners never challenged this ruling on appeal.

Petitioners do not dispute that, when this case came to trial before a jury on the issue of liability, Green was incapable of communicating with counsel or assisting

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[1] Respondents adopt and incorporate by reference the accurate recitation of the facts regarding Green's medical history as set forth in the opinions of the Maryland Court of Appeals and the Maryland Court of Special Appeals. Pet. App. 3a-4a; 72a-76a.

them in any manner. Pet. App. 163a, 168a. In their petition, they liken this adult to a one month old child. Twitching, unresponsive and uncomprehending, Green required the attendance of nurses and frequent, disruptive suctioning of his tracheostomy site. Pet. App. 173a-174a. Respondents concluded, with ample justification, that Green's presence in the courtroom would serve no rational purpose, but would evoke jury sympathy, would be potentially disruptive, and would effectively undercut the ruling bifurcating the trial. Accordingly, Respondents presented a motion to the trial court addressing the irremediable prejudice that would flow from Green's presence at the liability portion of the trial, which the trial court granted.

A. Petitioners' Conflicting Arguments in the Lower Courts

Petitioners fail to articulate a standard that they contend this Court ought to adopt to govern a trial court's determination of whether and when a plaintiff to a civil action may be barred from the liability phase of a trial. Moreover, Petitioners' positions below were inconsistent regarding the claimed bases of Green's right to be present during all phases of his civil trial. Even a tea leaf reading of Petitioners' arguments at trial fails to reveal the bases that Petitioners now assert support Green's right to have been present during the liability phase of the trial. Petitioners' position at trial, that Green was an essential piece of evidence necessary to prove their case, is nowhere to be found in their argument regarding why this Court ought to hear this matter.

At the trial court, Petitioners never argued that Green had an absolute right granted by the Constitution to be present during the liability phase of the trial. Rather,

Petitioners claimed that "a party to a civil action should have a *reasonable opportunity* to attend its trial." Pet. App. 146a (emphasis added). Petitioners acknowledged that trial courts have discretion, circumscribed by the due process clause, to limit a plaintiff's presence during the liability phase of a trial. Indeed, Petitioners argued in their written opposition to the defendants' motions in limine that the appropriate standard to be applied by the trial court in deciding whether he could be excluded during the liability phase of the trial was to be found in *Helminski v. Ayerst Laboratories*, 766 F.2d 208 (6th Cir. 1985), *cert. denied at* 474 U.S. 981 (1985), a position that they now apparently abandon. Pet. App. 146a-147a.

Petitioners claimed before the trial court that Green would be prejudiced if he were excluded from the trial, not because he would be deprived of a liberty interest,[2] but because his exclusion would prevent his counsel from using him as evidence to prove his case. Petitioners sought Green's presence solely to "prove" the elements of his medical malpractice claim against the defendants. Pet. App. 148a-149a. Petitioners argued that his presence was necessary so that the jury could see that his "current condition proximately resulted from the Defendants' breach of duty," to prove that the defendants' alleged conduct was the "legal cause of . . . his injuries," and to "establish the standard of care the Defendants were obligated to undertake." Pet. App. 149a-150a.

Although Petitioners argued briefly in their written opposition that, by barring Green from the liability phase

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[2] As a practical matter, since he lacked the ability to understand the proceedings, to participate in the trial, or to make a conscious decision whether he wished to be present or not, he could not truly exercise a "right" to be present.

of the trial, the trial court would be violating the Americans With Disabilities Act, they presented no coherent argument regarding what remedy would be available to them for such a violation, besides making the veiled threat that the trial judge himself might be personally liable to them for such a ruling. Pet. App. 150a-151a.

The final argument that Petitioners made in their opposition to the motions in limine was that the right to an "open trial" precluded an order from the trial court excluding Green from the courtroom. Pet. App. 151a-152a. Again, however, even though Petitioners claimed a right rooted in the Constitution – public access to trials – the lodestar of their argument remained that Green's presence was "a necessary aid to his counsel in presenting the elements of his liability claim." Pet. App. 152a.

At the pretrial hearing on the motions in limine, Petitioners again focused the trial court on Green's role as evidence. In response to the court's inquiry regarding why Petitioners sought to have Green present, Petitioners' counsel said that:

> [I]n the liability aspect of a trial, it is necessary that we also prove the damage. And not only that, but that the damage was foreseeable. . . . His condition, as he lives today, is something that is foreseeable for a child with hydrocephalus with a shunt in place, and that shunt may be malfunctioning.

Pet. App. 163a. Petitioners' counsel emphasized the point later by saying:

> The reason for having the Plaintiff here, Your Honor, is the element of proof of the foreseeability of the damages for someone in Darwin's situation when he walked into North Arundel Hospital on August 18, 1988 and the

> fact that even in liability, the issue alone, we have to prove the damages in fact occurred. And we can do that both by not only testimony, not only by medical records, but also by the presence of the Plaintiff himself.

Pet. App. 167a.

In this Court, Petitioners express outrage that the Maryland Court of Appeals stated in its opinion that, in the courtroom, Green would have amounted to no more than "an exhibit – a piece of evidence – that is both irrelevant and prejudicial, and thus invokes the balancing process enunciated in Maryland Rule 5-403." Pet. App. 30a. The Court of Appeals, however, merely demonstrated its familiarity with Petitioners' argument in the trial court, in the intermediate appellate court, and before the Court of Appeals that cast Petitioners' desire for Green to be present as evidentiary, and not as a sincere exercise of a Constitutional right. Counsel for Petitioners clearly emphasized before the trial court his desire to use Green solely as evidence to prove elements of his case.

In their appeal of the trial court's decision to the Maryland Court of Special Appeals, Petitioners began to shift ground, primarily in emphasis. On the issue of Green's exclusion from the trial, Petitioners put forward the trial court's alleged violation of the Americans With Disabilities Act as their first argument. Resp. App. 16-22. Petitioners again made no coherent argument regarding how the Act would give them relief in the form of the reversal of a civil judgment.

Next, Petitioners stuck by their assertion that "a party to a civil trial has a reasonable opportunity to attend its trial." Resp. App. 22. They put forward *Helminski* as the primary case providing the appropriate analysis where the trial court is determining whether to exclude a plaintiff from the liability phase of a trial. Resp.

App. 22-25. Petitioners argued once again that the prejudice Green suffered as a result of the exclusion was that he was the "best evidence" to be introduced to establish his liability claim. Resp. App. 26-28. Petitioners concluded their "evidence" argument by saying: "Judge Rushworth's barring of Green *from attending his own trial to demonstrate his condition* prevented his attorneys from appropriately establishing the duty, standard of care, and proximate cause elements of his liability claim." Resp. App. 28 (emphasis added).

Finally, Petitioners argued that the Constitution requires public access to trials, and that the trial court violated the Constitution by barring Green from the courtroom. Resp. App. 29. They claimed that they sought Green's presence not to vindicate that right, however, but because he "would have been a necessary aid to his counsel in presenting elements of his liability claim." Resp. App. 29.

In affirming the trial court's ruling on the motion in limine, the Court of Special Appeals held that "there is nothing in the ADA that provides a basis for reversing the judgment of a lower court in a civil dispute between private parties." Pet. App. 90a. Petitioners invited the Court of Special Appeals to apply the *Helminski* analysis to the facts of this case and it did, but it held that the trial court "went to great lengths to ensure that Darwin's constitutional rights were not violated" and affirmed the trial court's decision. Pet. App. 96a. Finally, the Court of Special Appeals held that the public's right to attend trials is not absolute, and, since the trial court found that his presence would prejudice the proceedings, "there was no abuse of discretion in barring Darwin from the courtroom." Pet. App. 97a.

Petitioners sought and obtained review in the Maryland Court of Appeals. There, Petitioners again asserted the ADA claim as their first argument, but, like before, presented no coherent support for the proposition that an ADA violation would permit the reversal of a civil judgment between private parties. Although not highlighted in Petitioners' brief as it had been before, the "Darwin Green as evidence" argument was included. Petitioners again urged the application of the *Helminski* analysis, this time asserting that both the trial court and the Court of Special Appeals had failed to implement the analysis properly – that is, Petitioners disagreed with the facts found by the trial court. Finally, they claimed that the right of public access to trials had been violated by the courts' rulings that the exclusion of Green from the courtroom was appropriate.

For the first time, however, Petitioners also argued that Green had been denied the right to confront witnesses, that the First Amendment guaranteed him the right to petition the government and thus to have access to the courts, that the court ought to apply an equal protection analysis to the case under strict scrutiny review, and, finally, in light of the enactment of the ADA, the *Helminski* analysis ought to be abandoned.[3] The Court

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[3] Also for the first time Petitioners argued that they had sought to have Green present "for a period of time less than an hour, on one day of the trial." Pet. App. 14a-15a. The Court of Appeals noted this new argument and suggested that, had Petitioners wished to have Green present throughout the trial, then a different case might have been presented, and the trial court "may well have been concerned about the disruptive effect of suctioning his air tube – the noise and the jerking movement that the court observed on the video." Pet. App. 15a n.4. However, since Petitioners stated before the Court of

of Appeals did not accept Petitioners' invitation to examine these new issues. Instead, like the Court of Special Appeals, the Court of Appeals held that nowhere in the ADA, or in the regulations promulgated thereunder, is there a remedy permitting the reversal of a judgment entered in a civil case between two private litigants. Pet. App. 19a. On the issue of whether the trial court complied with the due process clause in its determination that Green could be excluded from the trial, the Court of Appeals applied the *Helminski* analysis and found that the trial court did comply with the dictates of due process. Pet. App. 29a-30a.[4]

Not only do Petitioners fail to state what they believe the standard ought to be for determining whether a plaintiff may be excluded from the liability phase of a trial, but they also fail to discuss in the Petition how Green's presence in the courtroom could have affected the outcome of the trial. North Arundel Hospital and Dr. Mody were granted judgment at the midpoint of the trial on the basis that there was legally insufficient evidence of negligence on their part to take the case to the jury. Pet. App. 2a, 71a, and 98a. The jury did consider the case against Drs. Fields and Axelbaum, but it answered " 'no' to the special verdict form question, 'do you find the plaintiff has proven that [either Dr. Fields or Dr. Axelbaum] departed from accepted standards of care in the treatment of Darwin Green?' " Pet. App. 98a. Petitioners never

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Appeals that they only wished to have Green present for less than an hour on one day of the trial, it did not engage in an analysis of whether the trial court could properly have found that Green's presence in the courtroom throughout the trial would have been disruptive. Pet. App. 15a.

[4] The court did not address the public access to the courts issue, but Petitioners do not challenge that here.

challenged on appeal the propriety of the trial court's grant of judgment in favor of North Arundel Hospital and Dr. Mody.[5] Thus, the jury was not compelled to reach the causation issues which, according to Petitioners' arguments at trial and in the intermediate appellate court, demanded Green's presence as an exhibit. If one excludes the impermissibly prejudicial effect on the jury of a vegetative, uncomprehending, wheel-chair bound patient, uncontrollably jerking his limbs as nurses suction his tracheostomy, it is difficult for Petitioners to mount a cogent argument that the jury's determination that neither Dr. Fields nor Dr. Axelbaum was negligent would have been different if Green had attended trial.

B. Basis for Respondents' Pre-Trial Motion

Petitioners argue that Respondents and the trial court had "no cause for concern" regarding the appearance of Green in the courtroom. They have mischaracterized Respondents' pre-trial motions which addressed the presence of Green during the liability phase of the trial. Pet. 5. Fundamentally, Petitioners, unhappy with the trial court's factual determinations and the exercise of its discretion, are groping for a constitutional device to compel a different outcome.

Preliminarily, it is important to note that the trial court was so concerned about the potential for unfair prejudice to Respondents engendered by Green's injuries and damages that it entered an order bifurcating the case

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[5] With regard to Dr. Mody, judgment was granted in his favor because Petitioners failed to prove a factual predicate to support any opinion of their expert that Dr. Mody breached the applicable standard of care. Pet. App. 73a-74a.

for separate trials on liability and damages. Pet. App. 71a. This was a critical threshold in the procedural history of the case – one which set the stage for a subsequent examination by the court of whether the need for Green's presence at the liability phase of the trial outweighed the potential for unfair prejudice to Respondents resulting from his presence.

Respondents' motions rested on the uncontested fact that Green was in a vegetative state, unable to communicate, assist counsel, or to understand the proceedings in any way.[6] The motions rested in part on the undisputed fact that Green required constant skilled medical care, with an array of noisy medical equipment, that would inevitably have disrupted the proceedings and created a distraction for the jury. Implicit in the decision to bifurcate the trial was the court's valid concern that Green's physical appearance and condition would unfairly prompt the jury to prejudge the liability issues in the case in favor of Petitioners. Respondents' motion asked the court to weigh the risk of jury prejudice flowing from the inevitable and unavoidable sympathy generated by Green's physical appearance and condition against any need to have him present during the liability phase of trial. Pet. App. 155a-159a.

C. The Trial Court's Findings

To fully and fairly assess the danger of unfair prejudice to Respondents, and to balance that against Petitioners stated need to present Green as an element of proof during the liability phase of the trial, the trial court received evidence and made findings of fact. The court

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[6] Green's counsel recognized that Green functions at the level of a one-month-old. Pet App. 163a.

reviewed medical records of Green and deposition transcripts. Pet. App. 172a. Petitioners asked the trial court to watch a "day in the life" video tape of Green that they had produced for use at trial, so that the court could observe first-hand Green's condition and capabilities. Pet. App. 163a, 166a. This strategy back-fired on Petitioners because it provided one of the evidentiary cornerstones of the trial court's ultimate determination on the issue of prejudice.

Based on the documentary evidence, sworn deposition testimony, and the viewing of the "day in the life" video,[7] the court found that Green existed in a vegetative state, unable to communicate in any way, to comprehend or appreciate the proceedings, or to assist counsel in any manner. Pet. App. 173a-174a. Further, the court observed that Green is fed through a feeding tube, that he requires his airway to be suctioned as often as every two hours, and that he would require the attendance of at least one nurse during trial. The court also noted that when his airway is suctioned, "there is a jerking movement that lifts his legs and the extension of his arms above and about the bed he lies in." Pet. App. 173a. Finally, the trial court found that the presence of Green would create an exceedingly powerful sense of sympathy in the jurors, which would be beyond the repair of any cautionary

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[7] As the Maryland Court of Appeals noted in its Opinion below in this case, "A trial judge's viewing of a video prepared by the plaintiffs showing a 'day in the life' of the disabled plaintiff in lieu of actually observing the plaintiff in person has been held to allow sufficient fact-finding by the trial judge in order to decide whether the plaintiff's presence at the liability phase of the trial would be prejudicial. *See Reems v. St. Joseph's Hosp. and Health Ctr.*, 536 N.W.2d 666, 670 (N.D. 1995)." Pet. App. 94a.

instruction the court could give them, and which would amount to prejudice to the Defendants. Pet. App. 174a-175a.

D. The Trial Court's Legal Analysis

There were no Maryland precedents establishing a legal framework for the court's evidentiary findings regarding the issue of Green's presence at trial. As a result, the trial court examined persuasive authority from other jurisdictions and ultimately turned for guidance to the thoughtful and well-reasoned analysis in *Helminski v. Ayerst Laboratories*, 766 F.2d 208 (6th Cir. 1985), *cert. denied*, 474 U.S. 981 (1985). Pet. App. 172a. The overwhelming majority of state appellate courts and federal trial and appellate courts that have had occasion to visit this issue have followed the formula established in *Helminski*.

Helminski analyzed the constitutional propriety of the trial court's exclusion of a severely retarded and autistic party from the liability phase of a bifurcated trial. It was alleged at trial that the injuries which led to his retardation and autism were caused *in utero* by the manufacturers of a surgical anesthetic to which his mother, a certified registered nurse, was exposed during her pregnancy. The minor plaintiff in *Helminski* was handicapped to the point that he could not speak and was not toilet-trained. The U.S. District Court excluded the plaintiff from attending the trial, and the jury ultimately found no liability as to the defendants. The plaintiffs appealed to the Sixth Circuit Court of Appeals contending that the trial court's exclusion of the plaintiff violated his Fifth and Seventh Amendment rights.

The Court of Appeals for the Sixth Circuit observed that neither the Fifth nor the Seventh Amendments confer upon litigants an absolute right to be present at trial, and

that there exist certain circumstances which would justify the exclusion of a party. *Id.* at 213-14. To establish a clear line of demarcation, the Sixth Circuit identified the circumstances that would *not* justify exclusion. As a threshold matter, the Court stated that healthy parties, who do not suffer from any physical or mental impairment, cannot be excluded from trial on an arbitrary basis. *Id.* at 214. Next, the Court held that a party cannot be excluded based on that party's physical appearance, however pitiable, where the party can assist counsel or comprehend the proceedings, even where the appearance of the plaintiff may result in jury prejudice, unless the exclusion of the plaintiff is to avoid disruption or to preserve decorum in the courtroom. *Id.* at 214-15.

Having identified the situations in which a plaintiff may *not* be excluded from the liability phase of a bifurcated trial, the Court then identified the extremely limited circumstances under which a party *may* be excluded from the liability phase of trial.[8] First, the defendant must establish that the plaintiff's appearance or conduct would result in prejudice by impairing the jury's performance of its fact-finding task. If the court determines that the plaintiff's presence would be prejudicial, the court next considers whether the plaintiff can understand or comprehend the proceedings, or assist counsel. If the court finds that the plaintiff can comprehend the proceedings, or assist counsel, then exclusion of the plaintiff will be inappropriate, regardless of any impact of prejudice. If, however, the plaintiff cannot understand the proceedings or assist counsel, then it is within the court's discretion to

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[8] The Court in *Helminski* recognized that it is not appropriate to exclude a plaintiff from the damages phase of a trial.

exclude the presence of the plaintiff from the liability phase of the trial. Thus, the *Helminski* court narrowly drew its holding, setting out an extremely limited set of circumstances under which the trial court may properly exercise its discretion on the issue of exclusion. The *Helminski* court was critical of the factual underpinnings of the trial court's decision (it was based only on a description of the plaintiff's condition, and did not involve observation in person or by video tape, as occurred here). In the factual setting of that case, this deficiency was held to be harmless error, and the judgment was upheld. *Id.* at 218.

The *Helminski* court identified very limited circumstances under which a trial court has discretion to exclude a party from the liability phase of trial, provided clear evidentiary guideposts for fact-finding by the trial court, and set forth a clear formula to aid in the determination of whether those circumstance exist in a given case. In their petition, Petitioners fail to note that this Court denied a petition for a writ of certiorari at 474 U.S. 981 (1985).

Following the circumscribed path marked out in *Helminski*, the trial court carefully evaluated the evidence presented, as well as the reasonable inferences derived therefrom, and found that the moving parties had carried their burden of proof. Green clearly satisfied the *Helminski* exclusion criteria for the liability phase of the trial. Exercising its discretion within constitutional bounds, the trial court ruled that, in the limited factual setting of this case, Green's presence would deny Respondents their due process right to a fair trial of the liability issues in this bifurcated case.

E. The Appellate Holdings in this Case

In their effort to obtain review by this Court, Petitioners distort the carefully-crafted, narrow holdings of the Maryland Court of Special Appeals and the Maryland Court of Appeals in this case. Contrary to Petitioners' suggestion, the decisions of these courts on the issue of exclusion closely followed the holding of *Helminski* and were firmly anchored in precedent from other jurisdictions.

The Maryland Court of Special Appeals affirmed the trial court's ruling to exclude Green at 126 Md. App. 394, 730 A.2d 221 (1999) (Pet. App. 68a-101a), approving of the trial court's application of *Helminski* to its findings as an appropriate means of balancing the interests of the parties and preserving due process on both sides. The Court of Special Appeals examined the rationale supporting the analysis in *Helminski* (Pet. App. 90a-94a), reviewed the trial court record, and concluded that, "[a]pplying the *Helminski* analysis to the case at bar, we find no constitutional violation in Green's exclusion from the liability portion of the trial." Pet. App. 94a. The Court of Special Appeals praised the trial court's care and effort "to ensure that Darwin's constitutional rights were not violated by arbitrarily excluding him from trial." Pet. App. 96a. Petitioners did not assert an equal protection argument either before the trial court or the Court of Special Appeals. Resp. App. 1-39. As they had in the trial court, Petitioners contended that the exclusion of Green prevented them from exhibiting him to the jury in support of elements of their *prima facie* case. The assertion that Green's due process right to be present was violated by the trial court, which is so emphatically trumpeted in the present petition, was not clearly articulated in Petitioners' brief to the intermediate appellate court.

Maryland's highest court granted a writ of certiorari, and, like the intermediate appellate court, affirmed the ruling of the trial court. *See Green v. North Arundel Hosp. Ass'n., Inc.*, 366 Md. 597, 785 A.2d 361 (2001). Pet. App. 1a-67a. The Court of Appeals embraced the *Helminski* framework, as the trial court and intermediate appellate court had done, recognizing that the trial court had properly undertaken fact-finding, appropriately followed precedent, and had acted well within the discretion with which it is endowed in such matters.

The Maryland Court of Appeals agreed with the Sixth Circuit that the right of a party to attend trial is not absolute. However, a plaintiff's appearance alone will never justify the exclusion of that plaintiff from the liability phase of trial, even if prejudice will result, where the plaintiff is able to aid counsel or comprehend the proceedings. Following *Helminski*, the Maryland Court of Appeals stated that there must be a confluence of five factors as a predicate to the exercise of the court's discretion on this issue:

> In the liability phase of a bifurcated trial, the court has discretion to exclude a plaintiff where, after a hearing and an opportunity to observe the plaintiff, either in person or by other reliable means, the court determines, on the record, that: (1) the plaintiff is severely injured; (2) the plaintiff attributes those injuries to the conduct of the defendant(s); (3) there is a substantial prospect that the plaintiff's presence in the courtroom may cause the jury to side with the plaintiff out of emotional sympathy rather than on the evidence; (4) the plaintiff is unable to communicate or participate in the trial in any meaningful way; *and* (5) the plaintiff would be unable even to comprehend the proceeding. When all of those circumstances exist, as they did here, the

> plaintiff's presence is not truly an exercise of his/her right of presence, for the plaintiff is incapable of making a conscious decision in that regard. His presence is rather as an exhibit – a piece of evidence – that is both irrelevant and prejudicial. . . . There was no abuse of discretion here.

Pet. App. 29a-30a (emphasis in original).

Here, in the liability phase of a bifurcated trial, the trial court rested its findings on documentary evidence and its own observations of Green in the "day in the life" video, which *plaintiffs* created and asked the court to view. The trial court found that Green suffers from a severe mental and physical handicap, which Petitioners attributed to Respondents. The trial court determined that the presence of Green in the courtroom would generate such jury sympathy that Respondents would be incurably prejudiced, despite cautionary instructions to the jury. The trial court further found that Green is in a persistent vegetative state, unable to assist counsel or to comprehend the proceedings. The Maryland Court of Appeals specifically recognized that Green was only excluded from the liability phase of the trial because the facts of this case satisfied *Helminski's* narrow set of elements which must be established in order to exclude a party from the liability phase of a bifurcated trial. Pet. App. 30a.

It is unclear whether Petitioners concede that the holding in *Helminski* passes constitutional muster, or not. Their suggestion that the criteria adopted by the Maryland Court of Appeals is more "lenient . . . in allowing the involuntary exclusion of a party" (Pet. 22) than *Helminski* is simply belied by side-by-side comparison of these two decisions. If *Helminski* articulates a standard that satisfies

due process, it follows that the virtually identical standard adopted by the Maryland Court of Appeals is equally availing. If Petitioners are now challenging the holding in *Helminski*, it represents a departure from their reliance on the holding in this case in both the trial court and the Court of Special Appeals. Pet. App. 146a-150a; Resp. App. 22-25. Since this Court denied certiorari in *Helminski* more than sixteen years ago, that seminal Sixth Circuit decision has been followed and applied across the United States. *See, e.g., Rubert-Torres v. Hospital San Pablo, Inc.*, 205 F.3d 472 (1st Cir. 2000); *Gonzalez-Marin v. Equitable Life Assurance Soc.*, 845 F.2d 1140 (1st Cir. 1988); *Bremner v. Charles*, 312 Ore. 274, 821 P.2d 1080 (1991); *Gage v. Bozarth*, 505 N.E.2d 64 (Ind. Ct. App. 1987); *Caputo v. Joseph J. Sarcona Trucking Co., Inc.*, 204 A.D.2d 507, 611 N.Y.S.2d 655 (1994); *Burks v. Harris*, 1992 WL 322375, 1992 Tenn. App. LEXIS 913 (Tenn. Ct. App. 1992). Plaintiffs have not cited a single case concerning the issue of a party's presence at the liability phase of a bifurcated trial in which the holding in *Helminski* was disregarded or directly challenged.

What are the Petitioners asking this Court to do? If the right of a party to be present is not absolute, as they appear to concede, what test should be applied to determine when exclusion is constitutionally permissible? What constitutional flaws can Petitioners identify in the *Helminski* analysis, as adopted by the Maryland appellate courts? Contrary to Petitioners' assertions, the trial court not only made specific findings on each *Helminski* element, those findings were fully supported by the record. The history of this litigation has been driven and defined by Petitioners' constantly shifting and evolving theories to attack that outcome, which they find unacceptable. Stripped to its essence, Petitioners are simply disgruntled with

the trial court's fact-finding and the exercise of its discretion.

If the largely undisputed findings regarding Green's mental status and appearance, as well as the court's conclusions regarding likely jury prejudice, would not constitutionally justify exclusion in this bifurcated case, what findings do Petitioners contend would support exclusion? What attributes, in Petitioners' view, would a party require which would constitutionally permit exclusion, and are lacking in Green? Although Petitioners do not openly argue that every party has an absolute right to attend trial, their true position here is little more than thinly disguised absolutism – an approach that has never been accepted by any appellate court in a reported decision involving the presence *vel non* of an uncomprehending, uncommunicative plaintiff in the liability phase of a civil action.

REASONS TO DENY THE PETITION

I. THERE IS NO CONFLICT AMONG THE STATES AND LOWER FEDERAL COURTS

Petitioners argue that this Court should grant a Writ of Certiorari because state courts, as well as the U. S. Courts of Appeals for the First and Sixth Circuits, are in conflict as to the issue at hand.

A. There is no Conflict Between the First and Sixth Circuits

Petitioners assert that the decision of the Maryland Court of Appeals, as well as the Sixth Circuit's holding in *Helminski*, are in conflict with the First Circuit. Pet. App. 14-15. The Petition cites only two First Circuit cases: *Gonzalez-Marin v. The Equitable Life Assurance Soc.*, 845

F.2d 1140 (1st Cir. 1988), and *Rubert-Torres v. Hospital San Pablo, Inc.*, 205 F.3d 472 (1st Cir. 2000). Pet. App. 16, 19. An examination of those decisions fails to support Petitioners' claim of a conflict, and reveals that these opinions are in complete harmony.

1. In *Gonzalez*, the First Circuit found no error in the trial court's *refusal* to exclude a party who suffered from catatonic schizophrenia. There, the trial court's determination and the appellate court's holding were based on the defendant's failure to show that the presence of the plaintiff would prejudice the jury. The court, in *Gonzalez*, explicitly stated that its inquiry was guided by *Helminski*, and that the First Circuit is in agreement with the framework enunciated in *Helminski*. *See* 845 F.2d at 1145-46.

2. In *Rubert*, the First Circuit again confirmed that it is in accord with the holding in *Helminski*, and that the *Helminski* framework is the proper one to follow. *See* 205 F.3d at 478. *Rubert* reversed the trial court's exclusion of the plaintiff because of the absence of a record reflecting evidentiary findings and the court's basis for the exclusion. *See* 205 F.3d at 479-80.

B. None of the Cases cited in the Petition for the Proposition that a Party's Right to be Present at Trial is Absolute is Relevant or Analogous to this Case

Petitioners also contend that this Court should accept this matter for review because there are conflicts among the highest state courts with regard to the issue of exclusion. In an effort to establish support for this conflict claim, Petitioners assert that a minority of jurisdictions have held that a plaintiff has an absolute right to attend trial. Pet. App. 15-16. None of the cases relied upon by Petitioners holds that the federal Constitution provides a

litigant the absolute right to be present at a civil trial. These cases (1) were decided solely on state constitutional grounds, (2) did not deal with exclusion of parties from the courtroom, (3) did not involve *injured* parties who were excluded from trial, (4) involved no plaintiff with any type of mental incapacity, or (5) involved no party with any physical or mental injury whatsoever. Respondents adopt and incorporate by reference the discussion of these inapposite cases in the Opposition filed by North Arundel Hospital Association, Inc.

C. None of the Cases Cited by Petitioners that Held that a Party's Right to be Present at Trial is Not Absolute Conflicts with the Maryland Appellate Courts' Holdings in this Case, or with *Helminski*

Other state cases cited by Petitioners for the proposition that there is disarray among jurisdictions on the issue of exclusion are actually *in accord* with the holding of the Maryland Court of Appeals in this case, and with *Helminski*:

1. *Morley v. Superior Court*, 131 Ariz. 85, 638 P.2d 1331 (1981) (Pet. 17): In a pre-*Helminski* case, the Supreme Court of Arizona held that it is within the court's discretion to exclude a plaintiff from the liability phase of a bifurcated trial who, because of injury or disability, cannot understand or contribute to the proceedings, where the plaintiff will be fully represented by counsel. In addition, the Court stated that where the presence of such a plaintiff will prejudice the jury, the trial court's failure to exclude the plaintiff would deny the defendant the right to an unbiased jury.

2. *Purvis v. Inter-County Telephone & Telegraph Co.*, 203 So.2d 508 (Fla. Ct. App. 1967) (Pet. 17, 18): The court

held that the exclusion of an "irrational" and "somewhat argumentative" disabled plaintiff constituted error where there was no showing that he could not comprehend the proceedings.

3. *Gage v. Bozarth*, 505 N.E.2d 64 (Ind. App. 1987) (Pet. 17): This case holds that the exclusion of a minor quadriplegic plaintiff, who required a ventilator to breathe, was appropriate where there was a showing of imminent jury prejudice, coupled with a showing of no ability on the part of the plaintiff to comprehend the proceedings or to assist counsel. This case cites and follows *Helminski*.

4. *Dickson v. Bober*, 269 Minn. 334, 130 N.W.2d 526 (1964) (Pet. 17, 19): In a pre-*Helminski* decision, Minnesota's highest court found no error in excluding the plaintiff, who had sustained severe injuries in a motorcycle accident, where the plaintiff could not comprehend the proceedings or assist counsel, and where the court determined that the presence of the plaintiff would have been disruptive to the courtroom proceedings, as well as prejudicial to the defendant.

5. *Caputo v. Joseph J. Sarcona Trucking Co.*, 204 A.D. 2d 507, 611 N.Y.S.2d 655 (1994) (Pet. 17, 19): This intermediate appellate court held that although the physical appearance of the plaintiff alone is never enough to exclude the plaintiff from trial, exclusion is permissible when the plaintiff can neither comprehend the proceedings nor assist counsel. This case specifically cites and follows *Helminski*.

Other cases cited by Petitioner on this issue are factually far afield of *Helminski* and the instant case and are utterly irrelevant to the constitutional question presented. For example, *Matter of Radjpaul v. Patton*, 145 A.D.2d 494, 535 N.Y.S.2d 743 (1988) is a child custody case; *Ryfeul v.*

Ryfeul, 650 P.2d 369 (Alaska 1982) is a divorce case. Pet. 16-17. Both were decided on state law grounds, did not address federal constitutional issues, and involved no parties with physical or mental disabilities of any type.

Petitioners have not and cannot cite a single state or federal case with comparable facts that departs from the reasoning and holding in *Helminski*. Courts that have applied *Helminski*, and that have sustained the trial court's exclusion of parties include *Reems v. St. Joseph's Hospital and Health Center*, 536 N.W. 2d 666 (N.D. 1995); *Bremner v. Charles*, 312 Or. 274, 821 P.2d 1080 (1991); *Province v. Center for Women's Health & Family Birth*, 20 Cal. App. 4th 1673, 25 Cal. Rptr. 2d 667 (1993); *Caputo v. Joseph J. Sarcona Trucking Co.*, 204 A.D. 2d 507, 611 N.Y.S.2d 655 (1994); *Gage v. Bozarth*, 505 N.E.2d 64 (Ind. App. 1987). In the sixteen or more years since the *Helminski* decision was published, and certiorari was denied by this Court, these courts, like the Maryland appellate courts, have found that *Helminski*'s reasoning and methodology provided a workable approach to the problem of balancing the due process rights of civil defendants to a fair trial with the conditional right of a civil litigant to attend trial. Despite the somewhat hysterical expressions of concern in the present petition that the Maryland Court of Appeals holding, tracking *Helminski*, will invite mass exclusion of injured plaintiffs, the paucity of reported opinions on this issue in the sixteen years since this Court declined certiorari in *Helminski* strongly suggests that when this issue does arise, it occurs infrequently. If a stampede of excluded plaintiffs are expected in the wake of the Maryland Court of Appeals' decision, they would have emerged long ago, following *Helminski*. As the trial court and the Maryland appellate courts found in the instant case, *Helminski* establishes clear

guide posts that meet the requirements of due process for litigants on both sides and avoids arbitrary and unpredictable determinations.

II. A STRICT SCRUTINY, INTERMEDIATE SCRUTINY OR RATIONAL BASIS MODE OF REVIEW WAS NOT APPLICABLE TO THE MARYLAND APPELLATE COURTS' REVIEW IN THIS CASE

Petitioners argue that the Maryland Court of Special Appeals and the Maryland Court of Appeals erroneously failed to engage in a strict scrutiny, intermediate scrutiny, or rational basis review of the trial court's ruling in this case. Pet. 25. Respondents note as a threshold matter, in response to Petitioners' contention, that Petitioners never asked the trial court or the intermediate appellate court to apply an equal protection analysis; thus, Petitioners have waived the equal protection argument that they now attempt to assert through this argument.

These Respondents are unaware of any case where the levels and methods of scrutiny to which Petitioners refer have been applied to acts of the judiciary. Rather, these modes of review apply to the legislative branches of the federal and state governments, and to the statutes enacted by them. Accordingly, a strict scrutiny, intermediate scrutiny, or rational basis inquiry by the Maryland appellate courts would have been inappropriately applied to the trial court's ruling. However, even assuming, *arguendo*, that one of these standards of scrutiny should apply to the instant case, Petitioners' argument would still be unavailing. In *Clarke v. Jeter*, 486 U.S. 456 (1988), this Court stated that:

> In considering whether state legislation violates the equal protection clause of the Fourteenth Amendment, we apply different levels of scrutiny to different types of classifications. At a

> minimum, a statutory classification must be rationally related to a legitimate governmental purpose. . . . Classifications based on race or national origin, and classifications affecting fundamental rights, are given the most exacting scrutiny. Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy.

See Id. at 461 (internal citations omitted).

Thus, even if one of these levels of scrutiny were to apply to the instant case, it would not be strict scrutiny, as there is no classification in this case that is based on race, national origin, or which affects fundamental rights. Likewise, intermediate scrutiny would not apply as there is no classification in this case that is based on sex or illegitimacy. Thus, if one of these levels of scrutiny were to hypothetically apply to this case, it would be the rational basis standard, under which a statutory classification must be rationally related to a legitimate governmental purpose. Indeed, this Court has stated that the rational basis analysis applies in cases involving the mentally retarded. *See Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985).

Under a situation in which a rational basis analysis would apply to the trial court's ruling in this case, the burden would be *on the Petitioners* to show that the trial court's interest in ensuring fairness in the trial is not a legitimate interest, and that the exclusion of Green from the liability phase of trial was not rationally related to that interest. *See FCC v. Beach Communications, Inc.*, 508 U.S. 307, 314-15 (1993); *Bd. of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356, 367 (2001). Petitioners

have not endeavored to make any such showing, much less succeeded in satisfying that burden.

III. THE AMERICANS WITH DISABILITIES ACT DOES NOT CREATE ANY ISSUE THAT MERITS REVIEW IN THE SETTING OF THIS CASE

Petitioners also urge that the trial court's exclusion of Green from the courtroom during the liability phase of the proceedings violated his rights under the Americans With Disabilities Act ("ADA"), 42 U.S.C. §§ 12101 – 12213 (1994, 1999 Supp.) (Pet. 28-30). However, it is unclear what Petitioners wish this Court to do about this. The remedy they seek – reversal of the judgment below – is not provided in the ADA, or by any reasonable judicial gloss on that body of law. Implicitly, Petitioners seem to concede this. Any such change in the ADA must be legislated; Petitioners stop short of asking this Court to perform that function.

The portion of the ADA that is relevant here is Title II, 42 U.S.C. §§ 12131 – 12165 (1994, 1999 Supp.), which governs cases of alleged discrimination against disabled persons by public entities.[9] Section 12132 states:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

---

[9] As the Maryland Court of Appeals pointed out, State courts fall under the definition of "public entity" provided by section 12131(1)(B) of the ADA, which includes any agency or other instrumentality of a State of local government. Pet. App. 17a.

Further, 28 C.F.R. § 35.130(b)(7) (1999), the pertinent federal regulation with regard to the enforcement of the section 12132 ADA requirement, states:

> A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modification would fundamentally alter the nature of the service, program, or activity.

As the Maryland Court of Appeals stated, the ADA compliance cases to date with respect to courts have been in the context of accommodation of the disabled with respect to the physical accessibility of courthouse facilities. Pet. App. 17a. Whether a court order excluding a disabled person from a trial because of a prejudicial sympathy that the person's presence would create in the jury violates Title II of the ADA has not been decided by any court, as the Maryland appellate courts recognized. However, the Court of Appeals held that issue to be moot and unnecessary to resolve, because even assuming, *arguendo*, that such an order would violate the ADA, the remedies of reversal of judgment and remand for a new trial that Petitioners seek are not available under the statute or corresponding regulations. Pet. App. 17a-18a.

A disabled person who believes that he or she has been discriminated against by a court on the basis of that disability must first file a complaint with the Department of Justice, which investigates the claim and attempts to resolve the grievance internally. *See* 28 C.F.R. 35.170-35.172. When the Department cannot resolve the issue, it issues findings of fact, and then the complaining party may file a private lawsuit. *Id.* at 35.172-35.173. Nowhere in the remedial provisions of the ADA or the

corresponding regulations are reversal of court judgments or remands for new trial provided for alleged ADA violations. The Maryland Court of Appeals was correct in its assessment that:

> The entire thrust of the administrative remedial sections is in forcing public entities to make reasonable accommodations in their facilities or in their programs to preclude the wrongful exclusion of persons with disability and are injunctive or forward-looking in nature. The remedies available in a private lawsuit, subject to Eleventh Amendment considerations, may be broader and include compensatory damages and an award of attorney's fees against the public entity, but there is no indication that they would include setting aside a judgment in favor of a private party because a disabled person was wrongfully excluded from the courtroom.

Pet. App. 19a.

The issue is clear, as both Maryland appellate courts agreed in this case, that the remedy that Petitioners seek with regard to the purported ADA violation in this case is not available, even if a trial court's exclusion of a disabled party from the courtroom based on concerns of jury prejudice *would* violate the ADA. Thus, Petitioners' ADA arguments are moot. The Court of Appeals further elaborated that:

> Indeed, the inappropriateness of such a remedy becomes unmistakably clear when one considers that a violation of the ADA based on wrongful exclusion from a courtroom does not depend on the excluded person's status as a party in the pending case; a member of the public who is excluded from a public courtroom because of his/her disability has the same complaint under the ADA as a party excluded by reason of disability.

Pet. App. 20a.

In sum, the Maryland Court of Appeals did not hold that a court's exclusion from the courtroom of a disabled party who cannot assist counsel or comprehend the proceedings does not violate Title II of the ADA. Thus, that is not the issue with regard to the ADA in this case that would be the subject of review. What the Court of Appeals *did* hold is that this issue is moot because neither the ADA nor the corresponding regulations provide the remedies that Petitioners seek. Accordingly, Petitioners' grievance may only properly be remedied by Congress, which is the only body that can provide the remedies that Petitioners seek for the ADA violations that they allege, rather than by this Court.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

EDWARD S. HOROWITZ, ESQUIRE
(*Counsel of Record*)
LARRY A. CEPPOS, ESQUIRE
JAMES S. KNERR, ESQUIRE
ARMSTRONG, DONOHUE, CEPPOS
& VAUGHAN, CHARTERED
204 Monroe Street, Suite 101
Rockville, Maryland 20850
301/251-0440
Attorneys for Respondents
Richard T. Fields, M.D. and
Stewart P. Axelbaum, M.D.

JAMES A. ROTHSCHILD, ESQUIRE
E. DALE ADKINS, III, ESQUIRE
LYNN B. MALONE, ESQUIRE
GREGORY L. VANGEISON, ESQUIRE
ANDERSON, COE & KING, LLP
201 North Charles Street, Suite 2000
Baltimore, Maryland 21201
410/752-1630
Attorneys for Respondent Mody

App. 1

IN THE

COURT OF SPECIAL APPEALS OF MARYLAND

SEPTEMBER TERM, 1998

No. 538

DARWIN GREEN, A MINOR, etc., et al.

Appellants

vs.

NORTH ARUNDEL HOSPITAL ASSOCIATION, INC., et al.

Appellees

APPEAL TO THE COURT OF SPECIAL APPEALS OF MARYLAND FROM A FINAL JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY (HONORABLE LAWRENCE H. RUSHWORTH)

APPELLANTS' BRIEF

Suzanne C. Shapiro, Esquire
Scott E. Nevin, Esquire
Saul E. Kerpelman & Associates, P.A.
10 N. Calvert Street – Suite 600
Baltimore, Maryland 21202

Attorneys for the Appellants

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STATEMENT OF THE CASE

This is a medical malpractice action by the Appellant, Darwin Green, a disabled individual, through his parents and next friends, Teresa Johnson and Charles Johnson against the Appellees, Richard T. Fields, M.D., Stewart P. Axelbaum, M.D., Harshad R. Mody, M.D., and North Arundel Hospital Association, Inc. The Appellants' claim medical malpractice against Appellees, alleging that Appellees breached the standard of care by failing to properly diagnose Darwin Green's life threatening condition, and thereby prevent Darwin Green's subsequent injuries.

Originally, this case was brought in the Circuit Court for Baltimore City, styled *Darwin Green, et al. V. North Arundel Hospital Association, Inc., et al.*, no. 91340031/CL141283. At that time, the action was solely brought against Richard T. Fields, M.D. and North Arundel Hospital Association, Inc. On March 20, 1992 Judge Richard T. Rombro from the Circuit Court for Baltimore City ruled that the action was brought in the wrong venue. Judge Rombro proceeded to transfer the action to the Circuit Court for Anne Arundel County. (E-25 – E-43).

Subsequently, two additional defendants were added to the proceedings, Dr. Stewart P. Axelbaum and Dr. Harshad R. Mody. Dr. Mody maintained a medical office in Baltimore City. Once these additional defendants were added to the action, Appellants filed a motion to transfer the action back to the Circuit Court for Baltimore City, Appellants original choice of venue. Appellants' motion

to transfer was denied on August 2, 1996 by Judge Lawrence H. Rushworth of the Circuit Court for Anne Arundel County. (E47 – E-56).

On October 30, 1996 Judge Rushworth decided to bifurcate the issue of liability and damages, and a trial solely as to liability issues was scheduled for October 7, 1997. (E-11). Just prior to trial, on October 6, 1997 Judge Rushworth ruled that Darwin Green could not be present in the courtroom during the course of the trial. Judge Rushworth based his decision on Darwin Green's physical disability. (E-93 – E-114, E-134 – E-139).

The case proceeded to trial on October 7, 1997 before the Honorable Lawrence H. Rushworth. On October 17, 1997 Judge Rushworth granted Appellees' Motions for Judgment as to North Arundel Hospital and Dr. Mody. (E-1308 – E-1311). On October 21, 1997 the case proceeded to the jury. On that same day the jury returned a verdict in favor of Appellees, Richard T. Fields, M.D. and Stewart P. Axelbaum, M.D. (E-1587).

This appeal was then instituted.

QUESTIONS PRESENTED

I. Did the trial court in the Circuit Court for Baltimore City err as a matter of law in transferring Appellants' action to Anne Arundel County for improper venue?

II. Did the trial court in the Circuit court for Anne Arundel County err in denying Appellants' motion to transfer his action back to the Circuit Court for Baltimore City once Dr. Mody was added to the action?

III. Did the trial court err as a matter of law in barring the Plaintiff, Darwin Green from attending his own trial as a result of his physical and mental disability, in that such exclusion violated the Americans With Disabilities Act, as well as fundamental notions of equal access to justice?

IV. Did the trial court err in allowing Appellees to present a theory of their case that is against Maryland case law as stated in *Mehlman v. Powell*?

STATEMENT OF THE FACTS

Darwin Green was born on February 12, 1977. He was born with a medical condition called Arnold-Chiari malformation which left him with hydrocephalus (fluid on the brain). (E-231 – E-232). When Darwin was nine days old he had a shunt placed in the ventricle of his brain to release the build up of pressure caused by the hydrocephalus. (E-273, E-385). When he was approximately four and a half years old his shunt was intermittently functioning, and he had surgery to revise the shunt. (E-274 – E-275, E-385 – E-386).

Thereafter, Darwin did not experience any significant problems with his shunts. (E-234, E-385). He continued to develop and function relatively well. (E-385). Although his intellectual capability was somewhat limited, he attended school, did fairly well in his special education classes, and went on family vacations. (E-237 – E-239, E-278 – E-279, E-386).

On August 17, 1988, however, when Darwin Green was eleven years old he began to experience a headache.

(E-280, E-388). Darwin's father gave him Tylenol. (E-281, E-388). Later in the day on August 17, 1988 Darwin was still complaining about the same headache, which was unusual. (E-281 – E-282). Darwin began vomiting and felt nauseous. He wouldn't eat. (E-281 – E-282, E-388). On the morning of August 18, 1988 Darwin still had a headache and he was drowsy. (E-283, E-388). Darwin's parents were concerned, and Darwin's father, Charles Johnson took him to the emergency room at North Arundel Hospital Association. (E-284).

They arrived at the hospital at 11:05 A.M. and Dr. Richard T. Field was the physician on call at the emergency room. (E-388, E-1645, E-1647). Dr. Fields examined Darwin. (E-389, E-1647). After his examination at around 1:00 p.m. Darwin began to complain of a severe headache and then Dr. Fields ordered an emergency CT scan. (E-393, E-395).

Dr. Stewart P. Axelbaum is the radiologist who interpreted Darwin's CT scan. (E-400). Dr. Axelbaum's written report notes subdural hygroma with a calcified membrane causing some mass effect in the left cerebral hemisphere, large right parietal porecephalic cyst, possible aqueductal stenosis, bilateral shunts. (E-1648 – E-1649). Despite the remarkable nature of the CT scan, Dr. Axelbaum interpreted the CT scan as showing "all old" or "probably" old change. (E-1647 – E-1649). Darwin Green's medical expert, Dr. Buchholz testified that Dr. Axelbaum breached the standard of care when he reported that the changes were all old, because he failed to communicate to Dr. Fields the possibility of new change or a blocked shunt. (E-436).

Next, Dr. Fields consulted over the telephone with a neurologist, Dr. Harshad Mody. (E-401, E-1647). At 1:45 p.m. the hospital records note that "Dr. Mody feels the patient can go if headache relieved." (E-401, E-1647). During his emergency room stay Darwin was given Vicodin at around 1:28 p.m., a prescription pain killer. (E-393, E-402, E-1467). At 2:45 p.m., the hospital record indicates that the headache was gone. (E-1467). However, the administration of Vicodin made it difficult to determine whether the headache dissipated on its own or was simply suppressed by the potent oral narcotic. (E-407).

Dr. Field's shift at the hospital was to end at 3:00 p.m. and Dr. Field's calendar indicates that he had a party to attend. (E-1645). Merely twenty minutes after Darwin Green tells Dr. Fields that he no longer has a headache, at 3:05 p.m. Darwin is discharged from the hospital. (E-407, E-1647). The clinical impression noted on the hospital record is "vascular headache" and the instruction is for follow up with the child's primary care pediatrician, Dr. Lee. (E-408, E-1647). Darwin Green's medical expert Dr. Buchholz opined that the diagnosis of "vascular headache" is representative of the failure to recognize that Darwin Green had a more serious problem. (E-446). Moreover, Dr. Buchholz opined that Darwin Green should not have been sent home because he required the care of a neurosurgeon with regard to shunt malfunction and increased intracranial pressure. (E-448, E-478 – E-479).

At no time while Darwin was at North Arundel hospital did doctors at North Arundel Hospital diagnose Darwin as having shunt malfunctioning or shunt blockage. At no time while at North Arundel hospital did

doctors perform a shunt tap to determine if the shunt was malfunctioning. At no time while at North Arundel hospital did doctors call in a neurosurgeon or refer Darwin to a proper tertiary care facility for a determination of whether his shunt was malfunctioning or blocked. (E-611). At no time did doctors at North Arundel hospital tell Darwin's parents about the potential problems with Darwin's shunt. Darwin Green's medical expert, Dr. David Buchholz opined that Darwin's father should have been made aware of the issue of potential shunt malfunction and of the warning signs of this condition. (E-648).

After being released from North Arundel hospital at 3:05 p.m. on August 18, 1988 Darwin continued to complain of a headache and that evening his father gave him another Vicodin as prescribed by Dr. Fields. (E-459 – E-461). The next morning, August 19, 1988 Darwin still complained of a headache and his parents took him to his pediatrician, Dr. Lee. (E-241). Dr. Lee observed that Darwin had a headache, drowsiness and was not staggering, and he immediately arranged for Darwin's parents to take him to University of Maryland Hospital. (E-461 – E-463).

Doctors at the University of Maryland hospital correctly diagnosed Darwin as experiencing shunt malfunctioning or shunt blockage. (E-463 – E-464). He was admitted to the University of Maryland hospital on August 19, 1988. (E-242). Nonetheless, doctors at the University of Maryland did not operate on Darwin, and on August 20, 1988 he experienced cardiac arrest as a result of his shunt blockage. (E-464). Darwin was subsequently revived, however, he is now left in a chronic vegetative state. Darwin's current state of mental awareness is

unknown. He is unable to communicate. (E-246 – E-247, E-464).

Appellants' medical expert, Dr. David Buchholz testified at trial that Appellees breached the standard of care in failing to diagnose Darwin's shunt blockage at North Arundel Hospital. (E-422 – E-444, E-477). Moreover, if Darwin had received proper neurosurgical evaluation, including a shunt tap on August 18, 1988, and proper management from that point on, he would have avoided cardiac arrest that took place on August 20, 1988. (E-4842 – E-483).

ARGUMENT

I. The trial court in the Circuit Court for Baltimore City erred as a matter of law in transferring Appellants' action to Anne Arundel County for improper venue.

Maryland Code, Courts and judicial proceedings § 6-201 states as follows:

> (a) Civil actions. – Subject to the provisions of §§ 6-202 and 6-203 and unless otherwise provided by law, a civil action shall be brought on a county where the defendant resides, carries on a regular business, is employed, or habitually engages in a vocation. In addition, a corporation also may be sued where it maintains its principal offices in the State.
>
> (b) Multiple Defendants. – If there is more than one defendant, and there is no single venue applicable to all defendants, under subsection (a), all may be sued in a county in which any one of them could be sued, or in a county in

> which any one of them could be sued, or in the county where the cause of action arose.

Maryland Code, Courts and Judicial Proceedings § 6-202 adds that *in addition to the venue provided in § 6-201* and § 6-203, an action *may be brought* in the indicated county:

(8) Tort action based on negligence – where the *cause of action arose.*

Hence, § 6-202 provides additional venue, at the Plaintiff's option. If multiple venues are proper then the Plaintiff possesses the right to choose the one in which to proceed. *Simmons v. Urguhart*, 101 Md. App. 85, 98 (1994), rev'd on other grounds, 339 Md. 1 (1995). Where either § 6-201 or § 6-202 is applicable, it is the Plaintiff's choice. See *Swanson v. Wilde*, 74 Md. App. 57 (1988).

Pursuant to the venue statute "where the cause of action arose" is a term of art. One does not have a cause of action merely because a negligent act or omission occurred. A cause of action only arises when there is some injury that results from the negligent act or omission. In other words, the cause of action does not arise until an individual has a right to judicial relief. An individual does not have a right to judicial relief until an injury has occurred.

For illustration, assume that handing someone a burning stick of dynamite is considered a negligent act. This negligent act occurs in county A. The dynamite has not yet exploded in county A and thus, the Plaintiff has not suffered any injury in county A as a result of the negligent act. At this point the Plaintiff has no cause of action to sue for the negligent act because he has not

suffered any injury and does not have a right for judicial relief. The Plaintiff then leaves county A and enters county B. At this point the dynamite explodes and the Plaintiff suffers physical injury. Now the Plaintiff has a right for judicial relief. Clearly, the cause of action arose in County B, despite the fact that the negligent act took place in county A.

Taking this illustration one step further, assume that it is County A Hospital's duty to put out the burning fuse on the stick of dynamite. County A Hospital fails to put out the burning fuse. While in county A the fuse is slowly burning down, but the dynamite has not yet exploded. At this point, Plaintiff cannot sue County A Hospital for breaching its' duty to put out the burning fuse, because Plaintiff has not yet suffered any injury as a result of County A Hospital's failure. Plaintiff does not yet have a cause of action. The Plaintiff then travels to county B with the still burning dynamite, and at that time the dynamite explodes. A cause of action finally arises against County A Hospital, but in county B venue.

This Court has stated that a cause of action in negligence requires evidence of duty owed by defendant to plaintiff, breach of that duty by defendant, injury to plaintiff, and injury proximately caused by defendant's breach. Thus, a "cause of action arises" in negligence when facts exist to support each element. *Owens-Illinois v. Eagle Picher Industries, Inc.*, 87 Md. App. 699, 724-25 (1991). In a negligence case the injury would be the last element to come into existence. *Anchor Packing Co. v. Grimshaw*, 115 Md. App. 134, 155 (1997).

Likewise, the Plaintiff, Darwin Green's cause of action did not arise until the Defendants' negligence proximately caused injury to the Plaintiff. Darwin Green did not experience injury as a result of the Defendants' negligent acts or omissions until his stay at the University of Maryland Hospital in Baltimore City, Maryland. Although the Defendants' negligent acts and omissions in failing to adequately diagnose and treat the Plaintiff occurred in Anne Arundel County, Darwin Green's "cause of action" did not arise until he suffered injury, cardiac arrest and resultant brain damage, in Baltimore City.

§ 6-202 provides for venue where the cause of action arose, not where the negligent act or omission occurred. The plain language of the statutes shows the intent of the legislature for venue to lie where the cause of action arose. If the legislature intended for venue to exist where the negligent act occurred, the language of the statute would have indicated this intent. Consequently, Judge Rombro's original ruling was incorrect pursuant to Maryland Code, Courts and Judicial Proceedings § 6-202 and this case must be remanded for a new trial in the Circuit Court for Baltimore City.

II. The trial court in the Circuit court for Anne Arundel County erred in denying Appellants' motion to transfer their action back to the Circuit court for Baltimore City once Dr. Mody was added to the action.

Judge Rushworth erred in failing to transfer the action back to the Circuit Court for Baltimore City once Defendant Mody was added to the action. When Plaintiff added two additional defendants, Harshad R. Mody,

M.D. and Stewart P. Axelbaum, M.D. to the action significant circumstances changed. The Defendant, Harshad R. Mody, M.D. carries on a regular business in his Baltimore City office at Harbor Hospital, 3001 South Hanover Street, Suite GNM1, Baltimore, Maryland 21225. (E-55 – E-56). One who engages regularly in business in one county may be sued there even though his principal place of business is in another county. *Dodge Park Enters v. Welsh*, 237 Md. 570 (1965).

Consequently, this additional defendant allows the action to fall under the province of Baltimore City venue pursuant to § 6-201 and § 6-202 of the Maryland Code, Courts and Judicial Proceedings article. Based on the fact that the Appellants originally brought their action in the Circuit Court for Baltimore City, Baltimore City has always been the Appellants' first choice of venue, the cause of action arose in Baltimore City and significant circumstances applicable to the venue statutes changed since Judge Rombro's original ruling, clearly allowing for Baltimore City Venue, it was plain error for Judge Rushworth not to transfer the action back to Baltimore City.

III. The trial court erred as a matter of law in barring the Plaintiff, Darwin Green from attending his own trial as a result of his physical and mental disability, in that such exclusion violated the Americans With Disabilities Act, as well as fundamental notions of equal access to justice.

Judge Rushworth violated Federally mandated statutory law when he barred Darwin Green from the courtroom and from attending his own trial. On July 26, 1990, President George Bush signed into law the Americans

with Disabilities Act,[1] law that specifically prohibits discrimination on the basis of physical or mental disabilities in employment, transportation, public accommodations, telecommunications and state and local government services. (hereafter entitled "ADA"). See 42 U.S.C. §12101 et seq. (1990). The act promotes the eradication of continuing unfair and unnecessary discrimination, segregation and prejudice against those having, or perceived as having, mental or physical disabilities. 42 U.S.C. §12101 (1992). One of the purposes of the ADA is to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities. See *Tenbrink v. Federal Home Loan Bank,* 920 F. Supp. 1156 (1996). As with all Federal statutes barring discrimination, the ADA ensures disabled individuals the opportunity to take part in activities enjoyed by others. See *Alexander v. Pathfinder,* Inc., 906 F. Supp. 502, aff'd in part, rev'd in part 91 F.3d 59 (1995).

The ADA encompasses discrimination in employment (Title I, 42 U.S.C. §§ 12111-12117), public services (Title II, 42 U.S.C. §§ 12131-12165), and public accommodations and services operated by private entities (Title III, 42 U.S.C. §§ 12181-12189). In order to qualify for statutory protection under the ADA a person must be a "qualified individual with a disability." 42 USC § 12111(8) (1992); 28 C.F.R. §35.104 (1993). Qualified individuals with disabilities are those who: (a) have a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (b) have a record of such an impairment; or (c) are regarded as

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[1] The Act became effective January 26, 1992.

having such an impairment. 42 U.S.C. § 12102(2) (1992); 28 C.F.R. § 35.104 (1993). In the ADA, Congress included a wide-ranging definition of disability intended to cover those impairments that substantially limit "major life activities" such as caring for one's self, performing manual tasks, walking, seeing, hearing, breathing, learning, working, and participating in other reasonable activities. 28 C.F.R. § 35.104 (1993).

One of the most cherished beliefs of our system of government is equal access to justice. (See pages 20-21, infra). Congress by enacting the ADA sought to ameliorate court related discrimination by specifically including state and local courthouses within the definition of public services.[2] A public entity is defined in the Act as any state or local government, any department, agency, or instrumentality of a state of local government. 42 U.S.C. § 12131(1) (1990); 28 C.F.R. §35.104 (1993). Thus, the Circuit Court for Anne Arundel County is a public entity because it is a Department of state government. As a government entity, the state court system is required pursuant to the ADA to make all of its' services, programs, and activities available to qualified individuals with disabilities. *See People v. Caldwell*, 603 N.Y.S.2d 713 (1993). The ADA defines "qualified individual with a disability" as "an individual with a disability who, with

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[2] The ADA has been held to apply to the physical surroundings of a courthouse. *Kroll v. St. Charles County*, 766 F. Supp. 744 (E.D.Mo. 1991); *Layton v. Elder*, 143 F.3d 469 (8th Cir. Ark. 1998), In addition, a state judge who violated the ADA by not accommodating a handicapped person who needed special access to a restroom during trial was not immune from liability for this violation. *Livingston v. Guice*, 68 F.3d 460 (4th Cir. 1995).

or without reasonable modifications" is otherwise eligible to receive the government services in question. 42 U.S.C. § 12131(2) (1990).

Nondiscriminatory practices by public entities are covered under Title II of the ADA.[3] Part A of Title II and the Department of Justice regulations promulgated thereunder state as follows:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132 (1990); 28 C.F.R. § 35.130(a) (1993).

The ADA regulations lay out the steps a public entity must take to ensure that it does not exclude persons with disabilities from enjoying the same benefits afforded to the general population. The regulations state, in pertinent part:

> (b)(1) A public entity, in providing any aid, benefit or service, may not, directly, or

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[3] Title II of the ADA was expressly modeled after Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, which prohibits discrimination against disabled individuals by any program receiving public funds. 29 U.S.C. § 794 provides:

> No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . .

> through contractual, licensing, or other arrangements, on the basis of disability –
>
> (i) Deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit or service;
>
> (ii) Afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit or services that is not equal to that afforded others;
>
> (iii) Provide a qualified individual with a disability with an aid, benefit, or service that is not as affective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided others.

28 C.F.R. § 35.130(a) (1993).

Therefore, each state and local court system may not use procedures, practices, or methods of administration that discriminate against any qualified individual with a disability.[4] This prohibition extends to all persons who meet the statutory definition, including those persons

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[4] To prevail on claim for violation of Title II of the Americans with Disabilities Act (ADA), plaintiff must show: that he is a qualified individual with disability; that he was either excluded from participation in or denied the benefits of some public entity's services, programs or activities, or was otherwise discriminated against by the public entity; and that such exclusion, denial of benefits or discrimination was by reason of plaintiff's disability. 42 U.S.C. § 12132; *Weinreich v. Los Angeles County Metropolitan Transportation Authority*, 114 F.3d 976, 978 (9th Cir.1997). For ADA claims alleging discrimination on the basis of disability, the plaintiff carried the burden of proof. 42 U.S.C. § 12132.

who may appear to be prohibitively disabled from engaging in the particular service.[5] The ADA prohibits discriminatory effect regardless of a public entity's motive or intent. *Tyler v. City of Manhattan*, 857 F. Supp. 800, 814 (D. Kan. 1994). A qualified individual with a disability may bring an action under the ADA without exhausting federal administrative remedies. *Tyler*, 857 F. Supp. at 812.

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[5] Title 42 U.S.C. § 12134(a) authorizes the Attorney General to issue regulations to implement Title II of the ADA. Title 28 C.F.R. § 35.130 was promulgated pursuant to this authority. It states:

> A public entity shall not impose or apply eligibility criteria that screen out or tend to screen out and individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of that service, program, or activity being offered. 28 C.F.R. § 35.130(b)(8).

Thus, public entities cannot use eligibility criteria that screen out, or tend to screen out, individuals with disabilities unless the criteria are necessary. Under this "necessity exception," public entities may utilize eligibility criteria that screen out, or tend to screen out, individuals with disabilities only if the criteria are necessary to insure the safe operation of the program or if the individual "poses a direct threat to the health or safety of others." 28 C.F.R. § 35.130(b)(8); Part 35, App. A, at 455 (1995).

Because Congress explicitly authorized the Attorney General to promulgate regulations under the ADA, see 42 U.S.C. § 12134(a), the Court must give these regulations "legislative and hence controlling weight: unless they are arbitrary, capricious, or plainly contrary to the statute." *United States v. Morton*, 467 U.S. 822, 834 (1984).

Undeniably, Darwin Green is a qualified individual with a disability. Judge Rushworth, acting as an agent of a public entity, wrongly discriminated against Darwin and prejudicially excluded Darwin from participating in his trial and aiding his attorneys, based solely on his disabilities. This is a blatant violation of the ADA and the very iniquitous act that the ADA seeks to eliminate.

So far, no court has resolved the issue of a party's exclusion from trial in light of the ADA. Nonetheless, the Supreme Court of Oklahoma noted:

> there may need to be a re-examination of those cases . . . which hold that a disfigured plaintiff may be excluded if he or she cannot aid the attorney or comprehend the proceedings. These cases were decided before the enactment of the Americans with Disabilities Act, a law that specifically prohibits discrimination on the basis of a physical or mental handicap.

Cary v. Oneok, Inc., 1997 Ok. 60, 940 P.2d 201 (1997).

Even prior to enactment of the American with Disabilities Act federal and state courts have consistently held that a party to a civil trial has a reasonable opportunity to attend its trial. In *Helminski v. Ayerst Laboratories*, 766 F.2d 208 (6th Cir. 1985) the eighth U.S. Federal Circuit Court observed that although the Due Process clause of the United States Constitution does not give a civil litigant the absolute right to be present personally during his trial, due process is offended if he is excluded arbitrarily or in the absence of extreme circumstances.[6] The

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[6] Maryland's State Constitution embodies the notion of due process. The Maryland Constitution, Declaration of Rights,

Court went on to conclude that a Plaintiff's physical appearance alone does not warrant his expulsion. *Helminski*, 766 F.2d at 215. The ideals behind due process and a fair trial permit a party to be present in the courtroom absent extreme conditions.

The possibility of juror sympathy alone is not tantamount to juror prejudice, and is insufficient to exclude a party from the courtroom. *Helminski*, 766 F.2d at 216. The

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Article 5 states in part that "the parties to any civil proceeding in which the right to a jury trial is preserved are entitled to a trial by jury of at least 6 jurors."

Article 19 states "that every man, for any injury done to him in his person or property, ought to have a remedy by the course of the law of the land, and ought to have justice and right, freely without sale, fully without any denial, and speedily without delay, according to the law of the land." This article has been characterized as a guarantee of due process. 63 Op. Atty. Gen. 246 (1978). "The law of the land" in this article is the same due process of law required by the Fourteenth Amendment to the Constitution of the United States. *In re Easton*, 214 Md. 176 (1957). This article guarantees access to the courts. *Johnson v. Maryland State Police*, 331 Md. 285 (1993).

Article 40 states: "the liberty of the press ought to be inviolably preserved; that every citizen of the state ought to be allowed to speak, write and publish his sentiments on all subjects, being responsible for the abuse of the privilege." This article guarantees public access to court proceedings similar to that guaranteed by the First Amendment to the Constitution of the United States. *Baltimore Sun Co. v. Colbert*, 323 Md. 290 (1991).

Article 24 prohibits depravation of life, liberty, or property other than by judgment of his peers or by law of the land. This article embodies the United States constitutional concept of equal protection. *Renko v. McLean*, 346 Md. 464 (1996).

Helminski court set out that exclusion of a party is disfavored, and the party seeking exclusion must bear the burden of showing that only through exclusion can a fair trial be obtained. *Helminski*, 766 F.2d at 216. The requisite showing of prejudice cannot be satisfied simply by establishing that a Plaintiff has a physical or mental injury. The party seeking exclusion *must* show that the party's appearance or conduct is *likely to prevent the jury from performing its duty*. *Helminski*, 766 F.2d at 218.

Moreover, a jury will generally follow the court's instructions and decide a case based on the law presented. *Helminski*, 766 F.2d at 216. The likelihood of jury sympathy is not the equivalent of prejudice. A juror's sympathetic feeling toward a party does not necessarily lead to the conclusion that the jury will disregard the law to reach a verdict based on sympathy alone. *Helminski v. Ayerst Laboratories, Inc.*, 766 F.2d 208, 216 (1985). See also *Cary v. Oneok, Inc.*, 1997 OK 60, 940 P.2d 201, 205 (1997); *Mason v. Moore*, 641 N.Y.S.2d 195, 196 (1996). In the case sub judice, the court made no finding of fact that the jury would disregard the law and render a verdict based solely on Darwin's physical appearance.

The *Helminski* court then held that even if the party seeking exclusion meets its burden of showing prejudice, consistent with due process, a party still cannot be barred if the party can comprehend the proceedings or aid its attorney in the litigation. *Helminski*, 766 F.2d at 216.

In sum, under the *Helminski* test if the party's appearance does not prevent the jury from doing its job, then the party cannot be excluded from the courtroom. If the party's appearance is likely to prevent the jury from

doing its job then the court must still decide whether the party is able to understand the proceedings or can aid his counsel. Even if the party's appearance is likely to prevent a fair trial by affecting the jury's ability to decide the case on the facts, If the party can comprehend the proceedings or aid his counsel then he still cannot be excluded from the courtroom.[7]

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[7] Although Maryland Appellate Courts have never addressed the issue of excluding a party plaintiff from the courtroom based on physical appearance or mental status, and no court has fully addressed this issue since the enactment of the Americans With Disabilities Act, several states have addressed this issue prior to enactment of the ADA. Several courts have held that a party's physical appearance cannot be the sole basis for exclusion from the courtroom and does not amount to an extreme circumstance permitting exclusion. See *Carey v. Oneok, Inc.*, 1997 Ok. 60, 940 P2d 201 (Okla. 1997) (holding that exclusion of a severely burned and disfigured six year old child plaintiff from the courtroom was improper); *Florida Greyhound Lines, Inc. v. Jones*, 60 So.2d 396 (Fla. 1952) (holding that a party plaintiff on a stretcher, in a weakened, sickened and stupefied condition, attended by a nurse and hospital attendant was entitled to be present at trial, especially when the plaintiff happened to be unsightly from injuries which he was trying to prove the defendant negligently caused); *Mason v. Moore*, 64 N.Y.S.2d 195, 226 A. D.2d 993 (1996) (holding that a five year old brain damaged spastic quadriplegic with severe developmental delays and physical disability was entitled to be present at all stages of his trial when the basis for exclusion rested solely on a stereotypical assumption that a party's disability will prejudice the jury); *Marks v. Mobil Oil Corporation*, 562 F. Supp. 759 (E.D. Pa. 1983) (holding that a spastic paraplegic plaintiff confined to a wheelchair had a right to attend liability phase of personal injury trial, especially when his trial behavior was not disruptive); *Helminski v. Ayerst Laboratories*, 766 F.2d 208 (1985) (holding that testimony indicating that a Plaintiff was not toilet trained, could not speak,

In the case sub judice, Darwin Green's attendance at trial was necessary to aid his counsel in establishing elements of liability. In order for a plaintiff to prove a cause of action in negligence, the plaintiff must establish the following:

1. That the defendant was under a duty to protect the plaintiff from injury;

2. That the defendant breached that duty;

3. That the plaintiff suffered actual injury or loss; and

4. That the loss or injury proximately resulted from the defendant's breach of the duty. *Yonce v. SmithKline Beecham Clinical Laboratories, Inc.*, 111 Md. App. 124 (1996).

As a necessary part of Appellants' liability action, Appellants must prove that Darwin Green suffered actual loss proximately resulting from the Appellees' breach of duty. Clearly, Darwin Green's Physical condition has a bearing on the question of liability. Appellants alleged that Darwin Green's current condition proximately resulted from the Appellees' breach of duty. Consequently, it was necessary for Appellant's medical expert to explain to the jury, via the best example possible, that Darwin Green's current condition proximately resulted from the Defendant's breach of duty. See *Talcott v. Holl*, 224 So.2d 420 (Fla. 1969), cert. denied, 232 So.2d 181 (Fla.

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comprehend the proceedings, or assist counsel, and sometimes emitted frightening sounds was not sufficient to establish that the jury would be permitted from or substantially impaired in performing its duty).

1969) (A brain damaged plaintiff who alleged that her physician's negligence resulted in her condition was permitted to be present in court for a few minutes to demonstrate her condition. Specifically, the court permitted am expert witness to demonstrate the Plaintiff's condition by asking her certain questions to show her inability to speak or converse normally, and to request her to attempt certain motions to demonstrate her inability or limitations on such respects.)

In addition, Darwin Green needed to demonstrate to the jury his current condition in order to establish the "general harm" the danger of which the Appellees should have foreseen at the time they were treating Darwin. See *Yonce v. SmithKline Beecham Clinical Laboratories, Inc.*, 111 Md. App. 124 (1996). This element is necessary in order to prove that the Appellees were the legal cause of Darwin Green's injuries. Moreover, allowing the jury to view the potential harm that in fact occurred to Darwin Green is necessary in order for the jury to establish the standard of care the Appellees were obligated to undertake. The best evidence to exhibit the injury causally related to the Appellees' negligence is Darwin Green himself.

Darwin Green must demonstrate his current condition in order to illustrate an element of the applicable standard of care involved in this specific case. The standard of care for the proper treatment of a patient is not cut and dry but rather is necessarily fluid depending upon differing circumstances. One vital element in determining the standard of care in a given circumstance is clearly the foreseeable possible consequence of committing an error. A case in which it is known to the physician that a mistake has a very high likelihood of devastating

injury to the patient must obviously be handled with the utmost care. The risk to the patient, at least in part, dictates the required caution to be exercised by the physician. A splinter must be removed more carefully from a brain than from a finger. What informs this exercise of care is the physician's awareness of foreseeable possible consequences of error.

It is thus, incumbent upon the Appellants to show just what those foreseeable consequences were. What more powerful illustration can the Appellants possibly make to the jury of the possible consequences which should have been in Appelleees' minds on August 18, 1988 than to show those consequences realized in fact in the person of Darwin Green? The image of Darwin Green as he exists today is what should have been in Dr. Field's mind in August 1988, guiding his decisions in Darwin's case. The jury has a right to see those possible consequences, which Appellees admit were foreseeable, in its evaluation of whether enough care was taken to avoid those consequences.

Obviously, Darwin Green's current physical and mental condition is the very condition he's trying to prove the Appellees negligently caused. Thus, Darwin Green is able to aid his attorneys in presenting his case with regard to establishing vital elements of his claim. Judge Rushworth's barring of Darwin Green from attending his own trial to demonstrate his condition prevented his attorneys from appropriately establishing the duty, standard of care, and proximate cause elements of his liability claim.

Finally, the Supreme Court of the United States has held that the First and Fourteenth Amendments clearly give the public a right of access to trials themselves, civil as well as criminal. *Richmond Newspapers, Inc. v. Commonwealth of Virginia*, 448 U.S. 555 (1980). See also, *In re Oliver*, 333 U.S. 257 (1948). "Historically and functionally open trials have been closely associated with the development of the fundamental procedure of trial by jury." *Richmond*, 448 U.S. at 589. "Open trials are the bulwarks of our free and democratic government: public access to court proceedings is one of the numerous 'checks and balances' of our system, because 'contemporaneous review in the forum of public opinions is an effective restraint on possible abuse of judicial power.' " *Richmond*, 448 U.S. at 592. Public trial guarantees safeguards against any attempts to employ our courts as instrument of persecution or for the suppression of political or religious heresies. *Id.*

If Darwin Green were not a party to this action, and were merely an observer, he would have had every right to public access to the court proceedings under United States constitutional and statutory law, as well as state constitutional law. It follows that Darwin Green had every right to be present in court as a party to this action, especially in light of the fact that Darwin Green would have been a necessary aid to his counsel in presenting elements of his liability claim. It was impermissible that he was kept from the courtroom, and kept from aiding his counsel in establishing his claim, solely because of his status as a party who is physically and mentally disabled. Darwin Green had every right to present at a trial that profoundly influence the rest of his life.

IV. The trial court erred in allowing Appellees to present a theory of their case that is against Maryland case law as stated in *Mehlman v. Powell.*

Throughout this litigation Appellants have always contended that North Arundel Hospital, Dr. Fields, Dr. Axelbaum and Dr. Mody were negligent and breached the proper standard of care by not correctly diagnosing Darwin Green's serious medical condition, and releasing him from the North Arundel Hospital emergency room to his home. It is Appellants' contention that if Appellees had correctly diagnosed Darwin's condition at North Arundel Hospital on August 18, 1988, necessary efforts could have been made at that time to save Appellant, and he more likely than not would not have suffered injury two days later at the University of Maryland Hospital on August 20, 1988. It has never been the Appellants' theory of the case that Appellees' breach of the standard of care negatively impacted or caused University of Maryland to be negligent. Nonetheless, Judge Rushworth allowed Appellants to present this theory of the case to the jury.

Specifically, Appellees' counsel informed the jury that they must decide whether the decision making at North Arundel hospital as to Darwin Green's condition caused the Doctors at the University of Maryland hospital to act unreasonably, thereby causing injury to Darwin Green. (E-202, E-215, E-224, E-1535, E-1550 – E-1552).

Just prior to trial Appellants made a motion in limine. Specifically the motion requested the court to exclude any discussion before the jury of negligence of University of Maryland Hospital or that the University of Maryland caused the injury or the cardiac arrest of Darwin Green. The basis of the motion was that the issue the jury needs

to consider is whether doctors at North Arundel hospital acted unreasonably in that Darwin Green's eventual injuries were foreseeable, and the doctors at North Arundel hospital failed to take proper steps within the standard of care to prevent those reasonably foreseeable injuries. It was Appellants' contention that Appellees failed to make the correct diagnosis of Darwin Green's condition, and that his condition could have been successfully treated had the correct diagnosis been made at North Arundel hospital. Appellants' counsel informed the court that the law of Maryland makes clear the even if Darwin Green went to a second health care provider, and it was negligent as well, that does not bar Darwin Green's recovery from the first health care provider. Clearly, the two providers presented concurring negligence. (E-114 – E-119).

Judge Rushworth denied the Appellant's motion in limine stating: "well clearly, the – that should be in front of the jury. It is a question of what bearing your own hospital [University of Maryland] had upon the injuries sustained by the Plaintiff. That is what we are going to talk about in the course of the trial." (E-119).

Plainly, this is not the law in Maryland and Judge Rushworth committed reversible error in allowing Appellees to present this defense to the jury. The judge clearly allowed Appellees throughout the trial to defend their position by allowing the jury to believe that any negligence on the part of the University of Maryland superseded Appellees' breach of the standard of care. Moreover, Appellees were allowed to argue that the only way the Appellees could be held responsible would be if the Appellees caused or influenced negligence on the part of the University of Maryland.

The Maryland Court of Appeals has fully addressed this very issue. In the case of *Mehlman v. Powell*, 281 Md. 269 (1977) the court of Appeals held that a doctor's failure to correctly diagnose a patient's condition is still a proximate and efficient cause of a patient's death, despite the fact that it may have been subsequently accompanied by negligent acts of others.

In that case the Plaintiff, William Powell experienced shortness of breath and was referred by his primary care physician to Dr. Edward Mehlman, a specialist in internal medicine. Dr. Mehlman gave Mr. Powell various diagnostic tests but failed to administer a perfusion lung scan. It was alleged that this lung scan would have revealed that Mr. Powell was suffering from pulmonary embolic disease and that this disease would have been successfully treated had the correct diagnosis been made. One month later Mr. Powell was unable to get out of bed and his wife took him to the hospital At the emergency room, Dr. Ruben Cosca ordered an electrocardiogram. Dr. Cosca's reading of the electrocardiogram was erroneous. Based on this erroneous reading, Dr. Cosca diagnosed Mr. Powell with pneumonitis, rather than the serious, life threatening condition of pulmonary embolism. It was claimed that Dr. Cosca should have known, based on a correct reading of the electrocardiogram, that Mr. Powell was in imminent danger of dying from heart failure due to pulmonary embolism. As a result of the incorrect diagnosis Mr. Powell was released from the hospital and returned to his home. Two days later, without receiving any further medical care, Mr. Powell died from pulmonary embolism.

On Appeal Dr. Cosca, the emergency room physician claims that the Plaintiffs failed to establish that Dr. Cosca's negligence was a proximate cause of Mr. Powell's death. Dr. Cosca alleged that the subsequent failure of Dr. Mehlman to acquaint himself with the true clinical condition of the decedent, as well as the alleged failure of an employee of the hospital to notify Dr. Cosca of a correct interpretation of Mr. Powell's electrocardiogram were intervening acts of negligence which interrupted the causal connection between Dr. Cosca's negligence and Mr. Powell's death.

The Court of Appeals held that "subsequent negligence would constitute a defense only if it were a superseding cause of the decedent's injury." *Mehlman v. Powell*, 281 Md. 269, 275 (1977). The Court stated:

> Dr. Cosca's failure to correctly interpret the decedent's electrocardiogram continued to be a proximate and efficient cause of the patient's death, despite the fact that it may have been subsequently accompanied by the negligent omissions of others. *The negligence of a third party, which merely operates along with a defendant's negligence, presents an ordinary case of concurring negligence and does not affect the liability of the defendant.*

Mehlman v. Powell, 281 Md. 269, 276 (1977) (emphasis added).

In *Banks v. Iron Hustler Corp.*, 59 Md. App. 408, 431 (1984) the Court of Special Appeals established that the issue of whether the intervening act of a third party suffices as a superseding cause to relieve liability of the

first actor *is a question of law only when the evidence presented and the logical inferences deducible therefrom admit of but one conclusion.* See also *Yonce v. SmithKline Beecham Clinical Laboratories, Inc.*, 111 Md. App. 124, 141 (1996); *Caroline v. Reicher*, 269 Md. 125, 131 (1973); *Segerman v. Jones*, 256 Md. 109 (1969). Consequently, Judge Rushworth committed an error law of by letting Appellees use a defense strategy of conveying to the jury that Appellees were not to blame for any foreseeable injury to Darwin Green because of the subsequent negligent acts of doctors at the University of Maryland hospital.

Based on Judge Rushworth's error of law in believing that if doctors attending Darwin Green at the University of Maryland hospital were negligent, then Doctors at North Arundel hospital should be relieved of liability, Judge Rushworth prevented Appellants from adequately presenting their evidence of Appellees' negligence to the jury. First, Judge Rushworth refused to allow Appellants' medical expert Dr. David Buchholz to testify as to foreseeability of the general harm associated with Darwin Green's condition as presented on August 18, 1988. (E-646). This evidence, of whether the general type of harm sustained was foreseeable, was necessary to determine whether a duty exists, the appropriate standard of care, as well to determine proximate cause. *Yonce v. SmithKline Beecham Clinical Laboratories, Inc.*, 111 Md. App. 124, 139-45 (1996).

In addition, Judge Rushworth refused to allow Appellants' medical expert Dr. David Buchholz to testify that Appellees' negligence was a substantial factor in causing Darwin Green's injuries, and refused to allow Dr.

Buchholz to testify as to Darwin Green's present condition as it related to events at North Arundel hospital. He also refused to allow Dr. Buchholz to testify that Darwin Green's present condition could have been avoided had the standard of care been met at North Arundel Hospital. (E-468 – E-472, E-642 – E-644). In fact, Judge Rushworth refused to let in evidence as to Darwin Green's current condition. (E-243 – E-247). Again, this evidence was necessary to establish proximate cause on the part of Appellees. *Yonce v. SmithKline Beecham Clinical Laboratories, Inc.*, 111 Md. App. 124, 138-39 (1996).

Finally, Judge Rushworth incorrectly instructed the jury, through his pattern of instructions, that if the University of Maryland were negligent then Appellees were not negligent. Plainly, this is contrary to the law of concurring negligence as set out in *Mehlman v. Powell*, 281 Md. 269 (1977). Specifically, Judge Rushworth instructed: "for the plaintiff to sustain their burden of proof, they must by a preponderance of affirmative facts proven to your satisfaction that the injuries of which the plaintiff complains resulted from the alleged negligence of the defendant *and not from any other cause.*" (E-1478). In addition, Judge Rushworth instructed that "a physician is not liable for lack of success or *an honest mistake* or exercising judgment even if hindsight showed a different course would have been preferred. Physicians are allowed a wide range of exercise of their judgment and discretion." (E-1479). Then Judge Rushworth added that "you must not hold Drs. Fields and Axelbaum liable unless you find their conduct, their individual conduct was *clearly* not within the standard of care." (E-1479). Plainly, Judge Rushworth incorrectly instructed the jury that plaintiff

must prove that the doctors breached the standard of care by clear and convincing evidence, as opposed to the legally correct standard of a preponderance of the evidence. Moreover, he incorrectly instructed the jury that honest mistakes encompass a doctor's standard of care.

In conjunction with these erroneous instructions, Judge Rushworth refused to give Plaintiff's requested jury instruction no. 23. This jury instruction stated as follows:

> Members of the jury, you are instructed as a matter of law that the Defendants are liable to the Plaintiff for all injuries resulting from their negligence including specifically and injuries he Plaintiff may have suffered as the result of ongoing treatment necessitated by his original or initial condition.
>
> The rationale of the law is to prevent the responsible Defendant from seeking an avenue of escape from liability and responsibility by attempting to show that the subsequent treatment was not the best, was provided by a practitioner who lacked skill, or was negligent. This the law will not permit.
>
> Accordingly, even if Darwin Green received treatment for his condition which was not the best, furnished by a practitioner who lacked skill, or was even negligent, resulting in his injuries, the Defendants are responsible for all such injuries and damages. The defendants are not permitted to attempt to lessen or reduce its liability and responsibility to the Plaintiff for all injuries sustained by pointing to some subsequent treatment that Darwin Green may have had which created the injuries.

Kaplan v. Stein, 198 Md. 414, 84 A.2d 81 (1951).

Trieschman v. Eaton, 224 Md. 111, 166 A.2d 892 (1961).

Mehlman v. Powell, 281 Md. 269, 378 A.2d (1977)

This instructor correctly sets out the law applicable to the Appellants' theory of their case. It was error for the trial court to refuse to instruct the jury as to this theory when such theory is a correct statement of the law, and there is testimony which supports it. *Levine v. Rendler*, 272 Md. 1, 13 (1974); *Kelbaugh v. Mills*, 108 Md. App. 89, 94. Refusal to give this applicable instruction which was not covered by other instructions is grounds for reversal because such error was material and prejudicial.

Judge Rushworth further erred by not letting Appellants enter into evidence Dr. Field's calendar showing that he had a party to go to on the day he was treating Darwin Green. It is surely Appellants' right for the jury to be able to consider whether Dr. Fields was rushing to leave the hospital to attend a party, and therefore, failed to act within the proper standard of care. (E-123 – E-126, E-763 – E-766, E-1645).

Finally, Judge Rushworth refused to allow Appellants to enter into evidence an affidavit signed by Dr. Fields in which Dr. Fields attested under oath that North Arundel Hospital did not have proper equipment or facilities to perform a shunt tap. Later, Dr. Fields testified at his deposition that the hospital in fact had such equipment. (E-179 – E-180, E-420 E-422, E-929 – E-934, E-755 – E-763, E-1643 – E-1644). Clearly, the affidavit was admissible to show a prior inconsistent statement, to impeach the witness, and to allow the jury to properly assess Dr. Field's

credibility. See *Tyler v. States*, 105 Md. App. 495, 531 (1995); *Stewart v. State*, 342 Md. 230 (1996).

Based on all of these errors of law, Appellants were prevented from properly presenting to the jury their theory of the case, as well as evidence to support their theory of the case. Instead, the court allowed Appellees to present to the jury a defense strategy clearly in contradiction to Maryland case law. Consequently, this case must be remanded for a new trial.

CONCLUSION

For the reasons enumerated herein, the Appellants respectfully requests this Honorable Court to find that the trial court committed reversible error, and remand this case for new trial.

Respectfully submitted,

SAUL E. KERPELMAN &
ASSOCIATES, P.A.

/s/ Suzanne C. Shapiro
Suzanne C. Shapiro, Esquire
10 N. Calvert Street –
Suite 600
Baltimore, Maryland 21202
(410) 547-0202

/s/ Scott E. Nevin
Scott E. Nevin, Esquire
10 N. Calvert Street –
Suite 600
Baltimore, Maryland 21202
(410) 547-0202

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18'th day of September, 1998 a copy of the aforegoing document was mailed, postage prepaid to:

Kurt D. Karsten, Esquire
Roy L. Mason, Esquire
621 Ridgley Avenue
Suite 402
Annapolis, Maryland 21401

Attorneys for North Arundel Hospital Association, Inc.

Larry A. Ceppos, Esquire
Sharon A. Marcial, Esquire
Armstrong, Donohue & Ceppos
204 Monroe Street, Suite 101
Rockville, Maryland 20850

Attorneys for Richard T. Fields, M.D. and Stewart P. Axelbaum, M.D.

E. Dale Adkins, Esquire
Lynn B. Malone, Esquire
201 North Charles Street
Suite 2000
Baltimore, Maryland 21201

Attorneys for Harshad R. Mody, M.D.

/s/ Suzanne C. Shapiro
Suzanne C. Shapiro, Esquire

Supreme Court, U.S.
FILED

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(4)

No. 01-1303

IN THE

Supreme Court of the United States

DARWIN GREEN, ET AL.,

PETITIONERS,

v.

NORTH ARUNDEL HOSPITAL ASSOCIATION, INC., ET AL.,

RESPONDENTS.

On Petition for Writ of Certiorari to the Court of Appeals of Maryland

REPLY BRIEF FOR THE PETITIONERS

SUZANNE C. SHAPIRO
Counsel of Record
Saul E. Kerpelman & Associates, P.A.
10 North Calvert Street, Suite 600
Baltimore, Maryland 21202
(410) 547-0202

Counsel for Petitioners

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REPLY BRIEF FOR THE PETITIONER

Respondents assert in their briefs in opposition to Petition for Writ of Certiorari that no conflict exists among the lower courts as to any issue of federal law. They attempt to persuade this Court that lower courts have adopted a uniform standard for involuntary exclusion of a party from attendance at trial, which does not offend the Constitution. They argue that the Maryland Court of Appeals has merely followed well-settled law.

Respondents ignore the fact that the Maryland Court of Appeals has implemented the most radical extension of any court's doctrine for involuntary exclusion of a party thus far. The Maryland Court of Appeals has decided that a mentally limited person is not entitled to a constitutional standard of review when eliminating the fundamental right of presence at a courtroom proceeding. The Maryland court holds that a mentally disabled individual who cannot comprehend proceedings or aid counsel is in fact, not a person, but instead a piece of evidence only due a court's discretionary review. The majority of the court ruled:

> [when a] plaintiff is unable to communicate or participate in the trial in any meaningful way [and when] the plaintiff would be unable even to comprehend the proceeding * * * the plaintiffs presence is not truly an exercise of his/her right of presence, for the plaintiff is incapable of making a conscious decision in that regard. His presence is rather as an exhibit – a piece of evidence – that is both irrelevant and prejudicial, and thus invokes the balancing process enunciated in Maryland Rule 5-403. There was no abuse of discretion here. (Pet. App. 30a).

Respondents want this Court to overlook that Maryland's highest court has adopted the unimaginable standard that an individual can be so mentally disabled that he/she ceases to be a person entitled to fundamental guarantees of equal justice and due process which the Constitution was designed to protect. No other lower court has adopted such a standard.

Respondents also want this Court to ignore that judges on Maryland's highest court are in disagreement over this decision and that the opinion was not unanimous. Maryland's Chief Judge Bell wrote a lengthy, vigorous and in depth dissent highlighting the conflicting decisions throughout the Country. Pet. App. 49a-56a. Judge Rodowsky, one of Maryland's most senior judges during the Maryland appeal of this action, signed on to Judge Bell's dissent. These well-respected judges put forth a strong dissent, reaching the opposite opinion, that as a matter of *law* the trial court did not follow an appropriate federal constitutional standard.

Respondents endeavor to portray petitioners' position as advocating that parties have an absolute federal right to attend civil trials. Respondents then attempt to discredit this self-manufactured legal argument by showing that federal law is well settled on this issue. However, not once during the course of this litigation have petitioners argued an absolutist position. Petitioners have always recognized that parties may be excluded by voluntary waiver or to preserve decorum or to continue the orderly proceedings of the court. The very reason petitioners were not planning on bringing Darwin Green to court for the entire trial was to minimize any potential for disruption of the proceedings. Pet. App. 164a.

The trial court never made any finding that Darwin would be disruptive. Instead, the trial court found "that any viewing of the Plaintiff in person or by video would leave any party in a position to be emotionally struck and otherwise feeling sympathy for the Plaintiff." Pet. App. 65a.

However, Chief Judge Bell points out: "the court determined only that the jury likely would be emotionally struck and sympathetic, rather than prejudiced in favor of the petitioners." Pet. App. 65a. Petitioners below and at present assert that this stereotypical presumption of prejudice, based only on the potential for jury sympathy, without any actual finding of jury bias utilizing the jury screening process infringes on Darwin's constitutional and statutory rights.

Tellingly, respondents fail to mention anywhere in their briefs the Oklahoma Supreme Court case of *Cary ex rel Cary v. Oneok, Inc.*, 940 P.2d 201 (Okla. 1997). This case, published twelve years after *Helminski v. Ayerst Laboratories*, 766 F.2d 208 (6th Cir. 1985), diverges from the holding of *Helminski*, discusses the application of the ADA to the right to be present at trial, and the need for *Helminski* and similar cases to be reexamined in light of the ADA. In his powerful dissent, Chief Judge Bell did not fail to thoughtfully outline the conflicting holdings of these two cases. He stated: "I am not persuaded by *Helminski* and those cases permitting the exclusion of parties who are unable to aid counsel or understand the proceedings and whose physical appearance is determined to be prejudicial to the other party." Pet. App. 61a. Chief Judge Bell continued:

> I agree with the approach adopted by *Cary v. Oneok, supra.* * * * permitt[ing] the involuntary exclusion of a party "only in the case of extreme circumstances." * * * Accordingly, I would hold that, absent a voluntary waiver, a party may not be excluded from his or her trial except "to preserve decorum or to continue the orderly proceedings of the court." (Pet. App. 61a).

The *legal* standard annunciated in Maryland's majority opinion further conflicts with these two holdings because it forgoes any constitutional analysis. The decision treats a

mentally disabled individual as an inanimate object without any constitutional rights. The Maryland court, unlike any other court in the Nation, permits the trial court broad discretion to involuntarily exclude a party who cannot aid counsel or comprehend court proceedings without any constitutional safeguard in place.

Respondents' refusal to acknowledge the existence of a conflict is baffling. Law review articles have been written outlining the legal debate on this federal issue. Pet. 15, n.3. "Cases are properly regarded as conflicting if it can be said with confidence that another circuit would decide the case differently because of language in an opinion in a case having substantial factual similarity." R. STERN *et al.*, SUPREME COURT PRACTICE 355 (7th ed. 1993). Where a different legal standard requiring a different ruling is announced in a "very similar case coming from another lower court" there is an undeniable conflict. W. REHNQUIST, THE SUPREME COURT 265 (1987).

In dissent, Maryland's Chief Judge Bell and Judge Rodowsky go out of their way to outline the conflicting *legal* standards regarding this question of federal constitutional law, which require different rulings. Moreover, not even the judges of Maryland's highest court are in agreement as to the appropriate legal standard. The Maryland court has put forth a lengthy majority opinion and a lengthy dissenting opinion, which demand different rulings. Conflict within Maryland's own court only confirms the need for this Court's review.

Respondents assert that petitioners invited the courts below to adopt an evidentiary standard rather than a constitutional standard. Opp. 5. It is true that Darwin's presence in court would serve the legitimate purpose of helping to establish the standard of care and causation elements of his case.[1] Darwin's counsel intended to let

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[1] Petitioners stated clearly in their response to respondents' motion in limine to exclude Darwin that allowing the jury to see Darwin's

Darwin "speak" through his condition in order to prove standard of care and causation elements of his case, just as respondents were allowed to testify in court. In this regard Darwin would have been assisting in the presentation of his case. Nonetheless, this was not the only reason Darwin had a right to be present. Petitioners have fully outlined all of the reasons a party's presence is necessary in court. Pet. 23-24.

More importantly, Darwin is much more than an exhibit. He is not an inanimate object. He is a human being with the same constitutional rights as the rest of us, and that includes the fundamental right to be present at his own trial. The inability of Darwin to communicate should determine neither his status nor his rights. The trial court's assumption that Darwin was being "presented" to the jury (Pet. App. 174a) shows the dehumanizing manner in which the court viewed him. Petitioners' desire to have Darwin present in court to show his injury to the jury to establish elements of his claim is worlds apart from the Maryland Court of Appeals espousing that a mentally limited person, that is not smart enough to understand his constitutional rights, need not be granted constitutional review because that individual is not a person, but solely an evidentiary object.

Respondents also argue that constitutional review does not apply to this case because it involves "acts of the judiciary." Opp. 24. Nonetheless, on many occasions this Court has applied constitutional review to acts of the judiciary. Constitutional equal protection of the laws is applicable with respect to court proceedings.[2] *See, e.g.,*

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condition was necessary to establish both standard of care and causation. Pet. App. 148a-150a.

[2] Respondents state in their brief that petitioners never raised the issue of equal protection. Opp. 24. This is not true. In petitioners' response to the motion in limine to exclude Darwin Green the first sentence asserts that exclusion is "frank, blatant discrimination against a disabled person." Pet. App. 144a. Petitioners went on to state in their response as follows:

Edmondson v. Leesville Concrete Co., Inc., 500 U.S. 614, 628 (1991), *on remand*, 943 F.2d 551 (5th Cir. 1991); *Batson v. Kentucky*, 476 U.S. 79 (1986); *Shelly v. Kraemer*, 334 U.S. 1 (1948) (teaching that courts themselves may not be vehicles of discrimination); *E.B. v. Alabama ex rel T.B.*, 511 U.S. 127 (1994) ("Equal opportunity to participate in the fair administration of justice is fundamental to our democratic system. It not only furthers the goals of the jury system. It reaffirms the promise of equality under the law -- that all citizens, regardless of race, ethnicity, or gender, have the chance to take part directly in our democracy."). *See also Lee v. Habib*, 424 F.2d 891, 902 (D.C.Cir. 1970) ("Court procedures which of themselves invidiously discriminate * * * impair guarantees of equal justice which the Constitution was designed to protect.").

In *Batson v. Kentucky*, this Court stated: "harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice." *Id.*, 476 U.S. 79, 87 (1986). *See also Edmondson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 628, 630 (1991), *on remand*, 943 F.2d 551 (5th Cir. 1991) (extending this reasoning to civil

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> Article 24 [of the Maryland Constitution] prohibits depravation of life, liberty, or property other than by judgment of his peers or by law of the land. This article embodies the United States constitutional concept of *equal protection*. (Pet. App. 147a) (emphasis added).

Petitioners' counsel also made the trial court aware at the pre-trial hearing that he cannot discriminate on the basis of a physical or mental disability. Pet. App. 166a. Moreover, by raising the ADA petitioners were also raising statutory equal protection. When enacting the ADA Congress utilized its Section Five Power (the enabling clause) of the Fourteenth Amendment to enforce the equal protection mandate of the Constitution.

proceedings, as well as criminal proceedings) ("we note that injury caused by the discrimination is made more severe because government permits it to occur within the courthouse itself. Few places are a more real expression of the constitutional authority of the government than a courtroom, where the law itself unfolds. Within the courtroom, the government invokes its laws to determine the rights of those who stand before it. In full view of the public, litigants press their cases, witnesses give testimony, juries render verdicts, and judges act with the utmost care to ensure that justice is done"). *See also Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982) (holding that one of the reasons criminal trials are presumptively open to the public is because access to trials "fosters an appearance of fairness, thereby heightening public respect for the judicial process").

Respondents also argue that any error in excluding Darwin was harmless because it cannot be shown that the exclusion affected the outcome of the trial. Opp. 8. However, trial judges routinely commit errors during the course of trial that constitute reversible error. Some of these errors include not properly following federal constitutional law prohibiting acts of discrimination. Appellate courts often make findings that these violations of federal law constitute reversible error and remand the case. For instance, this Court has held that it constitutes reversible error for a trial court to allow attorneys to utilize discriminatory selection procedures when exercising preemptory challenges during the jury selection process. Such discriminatory practice violates the party to the action's Fourteenth Amendment, by compromising the representative quality of the jury. *See Batson v. Kentucky*, 476 U.S. 79 (1986). Likewise, exclusion of Darwin from the courtroom was so grave a violation of his rights that the error cannot be considered harmless and prejudicial error must be presumed.

Respondents declare that the ADA is not applicable to this federal issue of law because the remedy section of the ADA does not contain a provision that allows for the reversal of a judgment of a lower court. Opp. 26-29. Traditionally, legislation under the Fourteenth Amendment has been framed to *prohibit* a discriminatory action. Section 12132 of Title II of the ADA (42 U.S.C. § 12132) is framed in such a manner. Sometimes, however, eliminating discrimination, which threatens principles of equality, requires affirmative relief, as well. Congress has the authority on these occasions to adopt prophylactic rules to deal with those situations. *See City of Richmonds v. J.A. Croson Co.*, 488 U.S. 469, 490 (1989) (O'Conner, J., concurring and dissenting). The remedy section of Title II of the ADA (42 U.S.C. § 12133) allows for this type of affirmative relief.

Just because the remedy section of the ADA allows for a separate cause of action against the public entity for not abiding by the ADA, does not mean that state courts cannot review, or no longer have an obligation to review the violation of the ADA within the context of a civil action. If anything, the remedy section of the ADA expands the avenues that are available to a plaintiff who is excluded from trial, by giving him or her the right to file a separate action for injunctive relief and damages, in addition to any review of federal law within the action by the state court. Implicit in the idea that a state court can be sued in a separate action for violation of the ADA is the notion that the state court must comply with the ADA, and that lack of compliance constitutes reversible error.

The ADA is a far-reaching federal statute that requires much more than for a public entity to make reasonable modifications to policies or practices. Although that is one aspect of the ADA, the ADA is a plenary statute designed to halt all practices that segregate or exclude persons with disabilities, and those that treat them inferior or differently.

It is to ensure that persons with disabilities are given the same basic guarantees of our federal constitution allowed to all citizens of this country. Petitioners made the trial court aware of this federal law, and the court chose to close its eyes to its existence. Petitioners are not asking this Court to enforce a collateral remedy provided by the remedy statute of the ADA. Petitioners are asserting that the trial court violated federal statutory equal protection by discriminating against a disabled party and removing his fundamental right to attend his own trial, a right provided to all non-disabled litigants. This Court has held that discrimination has no part in the courtroom. Such discrimination constitutes prejudicial error and mandates a new trial on the merits.

How ridiculous would it sound if this Court held as follows: "There is nothing in the Fourteenth Amendment that provides a basis for reversing the judgment of a lower court in a trial. Assuming the lower court's ruling constitutes a violation of the Fourteenth Amendment, the defendant must file a separate action in federal court to enjoin the lower court from violating the Fourteenth Amendment. Furthermore, such a violation would not constitute reversible error and is irrelevant to the outcome of the case."?

Respondents say nothing to refute petitioners' argument, as well as Chief Judge Bell's statements in his dissent, that the Maryland Court of Appeals sanctions a trial judge presuming prejudice based on a stereotypical assumption that sympathy equates with juror bias without a more critical examination of whether juror bias will actually result. The trial court undertook no action to factually establish whether the entire jury pool would be actually prejudiced and unable to render a fair and impartial verdict based on the law and facts presented. The trial court merely surmised, stereotypically and uncritically that the mere sight of Darwin would render the entire jury pool unable to set aside feelings of sympathy. The trial court also presumed without further analysis that any sympathy would automatically lead to bias

and impartiality on the part of jurors. The trial court should have implemented less restrictive measures such as pointed voir dire questions, strikes for cause, and cautionary instructions to weed out any potential juror prejudice. It was error for the trial court to fail to exhaust all other means of ensuring a fair trial before resorting to banning a party from the courtroom.

There is nothing factually in the record to support the court's unexamined presumption that Darwin Green's presence would result in any juror prejudice, let alone prejudice that could not be overcome by other means. Hence, this ruling does not conform to the strict scrutiny analysis the court must perform before denying a party his fundamental right to attend trial. Respondents simply ignore the fact that the simple answer to avoid any potential prejudice to the defendants in obtaining a fair and impartial jury is exclusion of a biased juror from the panel, not exclusion of the party from trial.

It is time for this Court to resolve the exclusion issue in a uniform manner that comports with constitutional law. Further percolation in the lower courts is not needed. Given the exceptional practical importance of this issue for the fair administration of justice for *all* parties, the recurring nature of the issue, and that the decision below is erroneous as a matter of federal constitutional and statutory law, this case is the perfect vehicle for resolving the conflict and once and for all solving the exclusion issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

SUZANNE C. SHAPIRO
Counsel of Record
Saul E. Kerpelman & Associates, P.A.
10 North Calvert Street, Suite 600
Baltimore, Maryland 21202
(410) 547-0202

Counsel for Petitioners

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